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Supreme Court, U.S.
FILED

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UNITED STATES SUPREME COURT

October Term 1994

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MARK BABINSKI,
Petitioner

v.

PATRICIA REGUCCI, ZOFIA BABINSKI,
JOHN AKERS, RICK HELLAN
Respondents

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Case No.

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# PETITION FOR

# WRIT OF CERTIORARI

to

THE U.S. COURT OF APPEALS
FOR THE THIRD CIRCUIT

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Mark Babinski
Petitioner, Pro Se

85 5th Ave.
Garwood, N.J. 07027
Tel.: (201) 654-0596

56 pp

## QUESTION PRESENTED FOR REVIEW

The question is whether a person who omits to perform an act which she is legally required to do under state law (through that omission causing another to lose a fundamental liberty right) is a person subjecting another to a deprivation of a constitutional right within the meaning of Section 1983 ?

The question deals with the denial of visitation to a non-custodial parent by a State Judge during a Plenary Hearing, prior to which hearing the custodial parent was ordered to provide the child with counseling through a Court-appointed agency. Is the custodial parent liable under Section 1983 if she secretly provided counseling to the child through her private and not through the Court-appointed psychologist and then misled the State Judge to believe that the counseling was done as he ordered ?

The 5th and the 9th Circuit Courts of Appeal decided that under the preceding described circumstances the person omitting to perform an act that she is legally required to do is liable under Section 1983.

In my case the 3rd Circuit Court of Appeals affirmed the summary dismissal of my Complaint against such a person precisely because the custodial parent's "activities were contrary to orders issued by a New Jersey judge", i.e the defendant did not perform the act that she was legally required to do. [1]

This Court is asked to resolve the conflicting positions on this matter held by the 5th and 9th Circuit Courts of Appeal and the one taken by the 3rd Circuit Court of Appeals.

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[1]. OPINION, dismissing Complaint - APPENDIX, Exhibit B, p. 11.

A secondary question, arising because of the decision of the 3rd Circuit in this case, is the issue of liability under Section 1983 of state actors if they deprive a person of a constitutional right under color of state law unknowingly following illegal rules secretly created by a private party - in violation of state rules which the state actors believe they are applying. Is such a state actor liable or not ?

The 3rd Circuit's interpretation of case law laid out by this Court in 1988, appears to place an extreme burden on State Judges within its jurisdiction, by deciding that under these circumstances the state actor unwittingly applying secret rules created by private parties is liable under Section 1983.

## LIST OF PARTIES

| | |
|---|---|
| Mark Babinski, | APPELLANT<br><br>Plaintiff in District Court<br><br>Appellant in Third Circuit Court of Appeals |
| Patricia Regucci, | APPELLEE<br><br>Defendant in District Court<br><br>Appellant in Third Circuit Court of Appeals |
| Zofia Babinski, | APPELLEE<br><br>Defendant in District Court |

My original Complaint listed 4 Defendants - Zofia Babinski, Patricia Regucci, John Akers - employer of Zofia Babinski, Rick Hellan - employer of Patricia Regucci. The Complaint was dismissed as to all 4 Defendants.

The appeal I took to the Court of Appeals for the 3rd Circuit was only in regard to the dismissal of Complaint against Zofia Babinski and Patricia Regucci. I did not contest the dismissal of the Complaint against the other two Defendants.

The Court of Appeals for the 3rd Circuit affirmed the lower District Court's dismissal of the Complaint in its entirety.

In this appeal to the U.S. Supreme Court I am appealing the dismissal of my Complaint only in regard to Zofia Babinski and Patricia Regucci. The other two original Defendants are listed in the caption of this case only because of the Appellate Court rules.

Zofia Babinski did not appear Pro Se nor did she provide any representation for herself at the District Court level or the 3rd Circuit Court of Appeals.

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Santosky v. Kramer
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## REFERENCE TO ORDERS AND OPINIONS

My Complaint was filed in the U.S. District Court, District of New Jersey on December 31, 1992.

Hon. H. Lee Sarokin, U.S.D.J. after reviewing motions for dismissal filed by Defendants Patricia Regucci and John Akers dismissed my Complaint as to all 4 Defendants in ORDER (APPENDIX - Exhibit A) dated August 11, 1993. To support his decision the Judge issued an OPINION (APPENDIX - Exhibit B) also dated August 11, 1993.

In September 1993 I filed an appeal to the U.S. Court of Appeals for the 3rd Circuit asking to overturn the dismissal of Complaint only in regard to Defendants Zofia Babinski and Patricia Regucci. After a series of Briefs by me and Patricia Regucci the 3rd Circuit issued a JUDGMENT ORDER (APPENDIX - Exhibit C) in

which it affirmed the lower Court dismissal of my Complaint. No OPINION was issued by the U.S. Court of Appeals for the 3rd Circuit.

On May 27, 1994 the U.S. Court of Appeals for the 3rd Circuit certified its May 5, 1994 Judgment Order as a true copy issued in lieu of a formal mandate (APPENDIX - Exhibit C).

## JURISDICTION

My Complaint was filed in U.S. District Court asking for damages pursuant to 42 U.S.C. 1983. Because the Complaint was dismissed I asked the U.S. Appeals Court for the 3rd Circuit to review the matter arguing that Defendants Zofia Babinski and Patricia Regucci were liable under Section 1983. Because the Appeals Court affirmed the lower Court ruling I am asking this Court to review the matter.

I am appealing here the JUDGMENT ORDER (APPENDIX - Exhibit C) entered on May 5, 1994 by Judges Stapleton, Hutchinson and Roth of the U.S. Court of Appeals for the Third Circuit affirming in its entirety the ORDER Dismissing Complaint (APPENDIX - Exhibit A) entered by Judge H. Lee Sarokin, U.S.D.J. on August 11, 1993 in U.S. District Court, District of New Jersey.

This matter involves issues of liability under Title 42 Section 1983 of the United States Code - which confers jurisdiction on the appeal to this Court.

## CONSTITUTIONAL PROVISIONS/STATUTES THAT THIS CASE INVOLVES

### 14th AMENDMENT

> Section I. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

In this case I claim that my 14th Amendment rights were violated. Specifically, I claim that I was denied liberty (visitation rights with minor son Thomas) under color of state law (final action denying visitation by a State Judge) without due process (Zofia Babinski using a different doctor to provide psychological counseling to my son Thomas than ordered by the State Court Judge). This is prohibited by the 14th Amendment.

TITLE 42 SECTION 1983
of the United States Code:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Section 1983 of Title 42 of the United States Code is used here because relief can be granted under this statute if conduct complained of deprived me of the rights secured by the 14th Amendment and was committed by a person acting under color of state law.

14th Amendment issues described above and claims for relief based on 42 U.S.C. 1983 were raised in the Complaint filed in District Court.

The 14th Amendment and Section 1983 issues were again presented in my appeal to the Third Circuit Court of Appeals of the District Court's dismissal of my Complaint.

Additionally, in my appeal briefs to the 3rd Circuit I raised the issue of the incorrect application of the case law laid out by the United States Supreme Court in National Collegiate Athletic Association v. Tarkanian, 488 U.S. 179 (1988), which application gives rise to my secondary question dealing with Section 1983 liability of state officials because of actions of private parties. See iii.

## CONCISE STATEMENT OF THE CASE

I was divorced from my ex-wife, Defendant Zofia Babinski, on May 2, 1988. Zofia Babinski retained physical custody of my then 8-year old son Thomas while I was granted limited visitation rights. Within a few months of the divorce I applied to the Superior Court of New Jersey for an expansion of these visitation rights.

Hon. John M. Boyle, J.S.C. entered a series of Orders requiring my son Thomas to undergo psychological counseling prior to a Plenary Hearing dealing with expanding my visitation rights. These Orders were entered on July 22, 1988, August 18, 1988, November 18, 1988. These Orders required that my son Thomas obtain psychological counseling "to assist the child with the problems he is having over the separation of his parents" [11/18/88 Order] through a Court-appointed agency -

the Family & Children's Counselling and Testing Center of Elizabeth, New Jersey.

In his November 18, 1988 Order Judge Boyle scheduled a Plenary Hearing to deal with expanding my visitation for January 26, 1989. The date was set to permit for prior treatment of my son Thomas by the Family and Children's Counselling and Testing Center. My son Thomas was to be interviewed by the Judge at the time of the Plenary Hearing.

The Judge's authority to Order treatment of my son lies in New Jersey Court Rule R.5:3-3 Appointment Of Experts - within R.5:3 General Provisions For Family Actions of the Rules Governing Practice In The Chancery Division, Family Part. It is a custom and policy of the State courts to enter such Orders in family matters. The Family & Children's Counselling and Testing Center was the Court-appointed agency because the Court

had a contract with that agency to provide such services to Union County litigants in family matters.

By letter dated January 19, 1989 the Family & Children's Counselling and Testing Center informed Judge Boyle that "[w]ith regard to Mrs. Babinski and the child, Thomas, we have no record that Mrs. Babinski contacted our office to schedule follow-up evaluation and treatment for herself or her son". Judge Boyle cancelled the January 26, 1989 Plenary Hearing and entered a new Order, dated January 26, 1989 in which he made Zofia Babinski (the physical custodian of Thomas) an agent of the State in regard to providing treatment to my son Thomas by

> "ORDER[ING], that plaintiff, Zofia Babinski, immediately make an appointment for the infant child, Thomas, for an evaluation, therapy and counselling through the Family & Childrens Counselling and Testing Center"

As I pointed out in my December 31, 1992 Complaint in the District Court:

"Defendant Zofia Babinski did not comply with Judge Boyle's January 26, 1989 Order regarding herself and Thomas being provided with counseling through the Family and Children's Counseling and Testing Center. Neither she nor my son Thomas received any counseling or therapy through that organization.

Instead, on February 9, 1989 (just 4 days prior to Thomas' evaluation by the Family and Children's Counseling and Testing Center) Defendant Zofia Babinski took my son Thomas for counseling to Defendant Patricia Regucci, an employee of Personal Performance Consultants, Inc.

Defendant Patricia Regucci provided counseling to my son Thomas fully aware that it was in preparation for his Court ordered evaluation on February 13, 1989 and a future Plenary Hearing regarding my

visitation rights. [...] Most importantly, Patricia Regucci fully aware that under Court Orders she was not to provide counseling, did so, brainwashing my son Thomas to instill in him good feelings towards his mother and bad feelings towards me. [...]"

On April 19, 1989 a Plenary Hearing was held regarding expansion of my visitation rights with son Thomas. As a result of the illegal counseling provided by Patricia Regucci to my son Thomas, Judge John M. Boyle denied me the requested expansion of visitation with Thomas.

In 1990 I found out that Patricia Regucci rendered some services to my son Thomas. At the time of the April 19, 1989 Plenary Hearing neither Judge Boyle nor I were aware that Zofia Babinski disobeyed Judge Boyle's Orders and that Thomas received psychotherapy from Patricia Regucci rather than from the Family &

Children's Counselling and Testing Center.

In March 1991 I found out that the services rendered to my son Thomas by Patricia Regucci were related to the April 19, 1989 Plenary Hearing dealing with visitation.

When I realized that during the April 19, 1989 Plenary Hearing before Judge Boyle, my son Thomas was interviewed by the Judge having been provided secret psychotherapy by Defendant Patricia Regucci and no psychotherapy by the Family & Children's Counselling and Testing Center I filed this federal lawsuit. I brought this lawsuit pursuant to 42 USC 1983 because, due to actions of Defendants Zofia Babinski and Patricia Regucci,

> "on April 19, 1989 Hon John M. Boyle, J.S.C., under the color of state law, custom and policy denied me the liberty of visitation with son Thomas - without due process" [Complaint]

Immediately after the divorce my contact with my son Thomas was limited to a few hours every second weekend. This limited contact was imposed through the Final Judgment of Divorce entered by a State Judge.

Despite the fact that it was a State Judge, Hon John M. Boyle, who cloaked defendant Zofia Babinski with the state-created exclusive authority (or "right" or "privilege") to deliver Thomas for counseling to the agency with which the state court had a contract, the U.S. District Court Judge stated in his Opinion, [EXHIBIT B, p.10], citing from Lugar v. Edmonson Oil Co., 457 U.S. 922 (1982) that:

> ", the court concludes that plaintiff has failed to allege that his deprivation was 'caused by the exercise of some right or privilege created by the State or a rule of conduct imposed by the State or by a person for whom the State is responsible.'"
> (emphasis added)

Judge H. Lee Sarokin concentrated on the lack of exercise of a "rule of conduct imposed by the State" (Zofia Babinski did not follow the prescribed conduct) and did not address the issue of the exercise of the "right or privilege created by the State" for Zofia Babinski to be the exclusive deliverer of Thomas to the state approved agency for counseling. But then in his Opinion, [EXHIBIT B p. 13] the Judge, citing from National Collegiate Athletic Association v. Tarkanian, 488 U.S. 179 (1988), stated that

> "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law."
> (emphasis added)

That "misuse" means acting contrary to the state created authority, like in case of Zofia Babinski here, was established by the U.S. Supreme Court already in 1961

in Monroe v. Pape, 365 U.S. 167 at 171, again in 1974 in Scheuerer v. Rhodes, 416 U.S. 232 at 243, and recently in 1991 in Hafer v.Melo, 502 U.S. --- (1991), 112 S.Ct. 358. In Hafer this Court stated:

> "Congress enacted Section 1983 "'to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it'". Scheurer v. Rhodes, 416 U.S. 232, 243, 94 S.Ct. 1683, 1689, 40 L.Ed. 2d 90 (1974) (quoting Monroe v. Pape, supra, 365 U.S., at 171-172, 81 S.Ct., at 475-476)."
> (emphasis added)

The District Court Judge dismissed my Complaint using in his Opinion, [EXHIBIT B, p.13], the guidance of Tarkanian. The Judge stated, that my

> "[c]ase is like Tarkanian in that the final act challenged by plaintiff is the decision by Judge Boyle, clearly a state actor, not to increase plaintiff's visitation rights with Thomas. It is also like Tarkanian in that plaintiff seeks to hold defendants, who are private

actors, liable for the alleged influence that defendant Regucci's alleged "brainwashing" of Thomas had on Judge Boyle's decision." [EXHIBIT B p. 13]

In Tarkanian the U.S. Supreme Court found that the state actor who committed the final act was liable under Section 1983 but the private actor, whose recommendation regarding the final act challenged was accepted and used by the state actor, was not liable.

In Tarkanian the state actor held no power over the private party - i.e. the state actor did not cloak the private party with any authority to create and promulgate regulations and recommendations. The Court found that the set of recommendations regarding conduct, created by the private party, was formulated openly and independently of the state actor.

However, in this case, by applying Tarkanian, the District Court Judge and the 3rd Circuit broadened the scope of protection offered a private party under Tarkanian, by including private parties cloaked with the authority of the state.

In the case at hand the deprivation of a constitutional right caused by a state actor (State Judge) guided by conduct of a private party cloaked with the authority of the state (Zofia Babinski, who had the exclusive right to provide Court-ordered psychological treatment) did not make the private party liable under Section 1983, according to Judge Sarokin. That the state actor had full power over the private party is evident here by the fact that Judge Boyle cancelled the originally scheduled Plenary Hearing when he found out that his regulations were not follwed by the private party and ordered the party to comply.

Unfortunately, the 3rd Circuit affirmed that if the state judge is under the illusion that the regulations created and promulgated by himself are being applied then the private party is not liable under Section 1983 for misleading the state actor, for secretly and independently creating new regulations and recommendations, and for forcing the state actor to unwittingly use these new regulations.

On the other hand the District Court and the 3rd Cicuit Court of Appeals left intact the basic presumption of Tarkanian that the state actor is liable under Section 1983 - in this case for having incorrectly applied to another person the secret regulations and recommendations of a private party. [2]

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[2]. The State Judge, Hon. John M. Boyle, was not named by me as defendant in this or any other case. Why should he be ? By cancelling the originally scheduled Plenary Hearing, he clearly indicated that he would not have permitted a new hearing if he knew that Zofia Babinski did not follow his Orders.

Does that mean that any Judge in a state Family Court when deciding on matters dealing with visitation and custody and acting as he/she does because of misleading or false information supplied by one of the private parties is automatically liable under Section 1983 if he/she makes any decision (granting or denying) petitioner's application ? This Court has implied in Santosky v. Kramer, 455 U.S. 745 (1982), at 753, that the Judge has to provide a parent with "fundamentally fair procedures" because in matters of visitation and custody parents have a "fundamental liberty interest".

Specifically, the Court stated in Santosky, at 753:

> "The fundamental liberty interest of natural parents in the care, custody, and management of their child is protected by the Fourteenth Amendment. [...] When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures."

What is the level of inquiry that a Judge would have to subject both parties in a visitation/custody proceeding to establish if his Orders were followed before his decision regarding these matters would not subject him to liability under Section 1983 ?

Unlike defendant Zofia Babinski who was a state agent by virtue of Judge Boyle's orders, Patricia Regucci acted as a private person when rendering services to my son Thomas. However, she conspired jointly with a state agent, Zofia Babinski, to have Judge Boyle deny me without due process visitation with son Thomas.

Patricia Regucci as a <u>private person</u> acting jointly with a <u>state agent</u>, Zofia Babinski, is liable under Section 1983. Of course, if the U.S. Supreme Court finds that Judge Sarokin did not err in dismissing my Complaint against Zofia

Babinski then I have no standing in my action against Patricia Regucci. However, if the U.S. Supreme Court finds that Zofia Babinski was a state agent and Judge Sarokin's decision regarding that defendant is overturned then the same should apply to Defendant Patricia Regucci.

> 'Private persons, jointly engaged with state officials in a challenged action, are acting "under color" of law for purposes of Section 1983'
>
> Dennis v. Sparks, 449 U.S. 24 (1980)

## WHY THE QUESTIONS PRESENTED ARE SUBSTANTIAL TO MERIT REVIEW BY THE U.S. SUPREME COURT

The 3rd Circuit does not appear to have any cases decided which would indicate that it is of the opinion that a person who omits to perform an act that he/she is legally required to do under State law is liable within the meaning of Section 1983.

By affirming the lower Court dismissal of my Complaint and relying on the District Court's Opinion, the 3rd Circuit in effect accepted Judge Sarokin's proposition that in the Third Circuit a private person who omits to perform an act that he/she is legally required to do under State law is not liable within the meaning of Section 1983.

But the 5th Circuit and the 9th Circuit have decided that persons are liable under Section 1983 in the circumstances of Zofia Babinski by

stating in Johnson v. Duffy (9th Cir. 1978) 588 F.2d 740, 743 (citing from Sims v. Adams (5th Cir. 1976) 537 F.2d 829):

> "A person "subjects" another to the deprivation of a constitutional right, within the meaning of Section 1983, if he does an affirmative act, participates in another's affirmative acts, or omits to perform an act which he is legally required to do that causes the deprivation of which complaint is made."
> (emphasis added)

By deciding my case the U.S. Supreme Court can resolve the conflict between the opinions on these matters of the 5th Circuit, 9th Circuit and the 3rd Circuit U.S. Courts of Appeal.

The impact of a U.S. Supreme Court decision would be significant because of the large number of cases decided annually in State Courts on issues of visitation and custody. This is clear from the latest statistical data provided below, not only for New Jersey but also

for the two large neighbouring States of New York and Pennsylvania.

In New York in 1993 (latest year data available) the total number of filings in Family Courts was 591,556 of which 75,685 or 12.79% were filings dealing with the administrative court classification "Custody of Minors". [3]

In Pennsylvania in 1992 (latest year data available) the total number of filings in Family Courts was 317,059 of which 27,680 or 8.73 % were filings dealing with the administrative court classification "Custody/Partial Custody /Visitation". However, these issues of custody could also appear as part of the "Divorce" filing classification (46,075 or 14.53% of the total filings). [4]

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[3]. Table 2-8, Filings and Dispositions in Family Courts Statewide by type of Petition - statistical data provided by the State of New York Unified Court System Office of Management Support, 80 Center Street, New York, N.Y. 10013, tel.: (212) 417-4781.

The New Jersey data supplied by the Administrative Office of the Courts is more difficult to interpret bacause of different classifications. In New Jersey in 1993 (latest year data available) the total number of filings in Family Courts was 339,986. Of these cases the administrative offices of the courts have classified 54,064 or 15.90% as "Dissolution" and 120,652 or 35.49% as "Non-Dissolution". These two New Jersey classifications include matters of both divorce and custody/visitation. [5]

If one applies to New Jersey the Divorce versus Custody case distribution of Pennsylvania (46,075 vs. 27,680) the number of cases dealing with custody/partial custody/visitation in New Jersey would be 65,570 or 19.29% of the total Family Court filings.

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[4]. Statistical data supplied by the Administrative Office of Pennsylvania Courts, 1515 Market Street, Philadelphia, PA 19102, tel.: (215) 560-6300.

A Supreme Court decision in my case would have a broad impact on visitation/custody proceedings in State Courts, i.e. possibly compel parties to follow Court Orders regarding visitation /custody proceedings or risk liability under Section 1983.

By reviewing my case this Court can also clarify the issue of Section 1983 liability on the part of State Judges when they act in violation of the 14th Amendment not knowingly but unwittingly based on incorrect conduct and information provided by the private parties. The 3rd Circuit decision to apply Tarkanian to my case appears to place a great burden of verification of private party conduct on State Judges.

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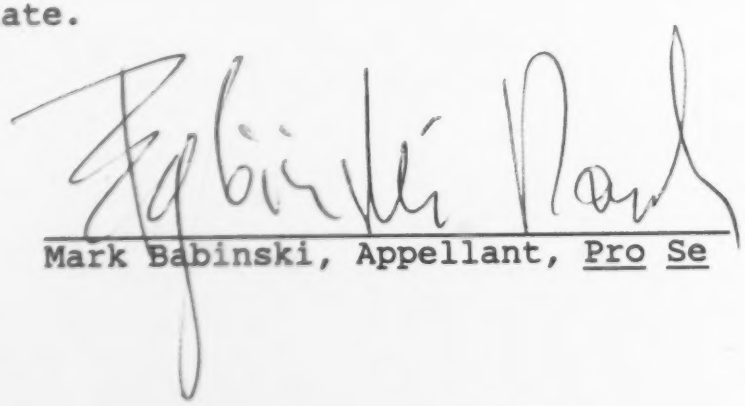
[5]. Statistical data provided by the Administrative Office of the Courts, State of New Jersey, Richard J. Hughes Justice Complex, CN 037, Trenton, N.J. 08625, tel.: (609) 984-7231.

Because many petitioners in Family Court are not lawyers and represent themselves Pro Se, like me, there is a question whether this burden of verification of private party conduct can be reasonably placed on the opposing parties.

In addition, by taking my case for review the U.S. Supreme Court can define the meaning of what is an agent of the state in visitation/custody matters and whether State Court Judges can cloak custodial parents with enough state authority to convert them into agents of the State.



Mark Babinski, Appellant, Pro Se

Date: September 6, 1994

UNITED STATES SUPREME COURT

October Term 1994

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MARK BABINSKI,
Petitioner

v.

PATRICIA REGUCCI, ZOFIA BABINSKI,
JOHN AKERS, RICK HELLAN
Respondents

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# APPENDIX

to

PETITION FOR
WRIT OF CERTIORARI
to
THE U.S. COURT OF APPEALS
FOR THE THIRD CIRCUIT

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

/stamped: FILED Aug 11 1993 AT 8:30
WILLIAM T. WALSH CLERK/

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|---|---|
| MARK BABINSKI,<br>Plaintiff,<br>v.<br><br>PATRICIA REGUCCI,<br>ZOFIA BABINSKI,<br>JOHN AKERS and<br>RICK HELLAN,<br>Defendants | Civ.No. 92-5510 (HLS)<br><br>O R D E R |

This matter having come before the court upon the motions of defendants John Akers and Patricia Regucci to dismiss plaintiff Mark Babinski's complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted and upon plaintiff's motion for summary judgment against defendant Zofia Babinski and upon the court's own motion; and the court having considered the submissions of the parties; and for the reasons expressed in the accompanying opinion; and for good cause shown,

IT IS this 11 day of August 1993, hereby

ORDERED the motions of defendants Akers and Regucci to dismiss plaintiff's complaint are granted; and it is further

ORDERED that plaintiff's motion for summary judgment against defendant Zofia Babinski is denied; and it is further

ORDERED that plaintiff's complaint is dismissed as to defendants Zofia Babinski and Rick Hellan; and it is further

ORDERED that the Clerk of the Court dismiss plaintiff's complaint in its entirety with prejudice.

/signature: H. Lee Sarokin/

H. LEE SAROKIN
U.S. District Court Judge

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

/stamped: FILED Aug 11 1993 AT 8:30
WILLIAM T. WALSH CLERK/

| | |
|---|---|
| MARK BABINSKI,<br>Plaintiff,<br>v.<br><br>PATRICIA REGUCCI,<br>ZOFIA BABINSKI,<br>JOHN AKERS and<br>RICK HELLAN,<br>Defendants | Civ.No. 92-5510 (HLS)<br><br>O P I N I O N |

Sarokin, District Judge

Before the court are motions by defendants John Akers and Patricia Regucci to dismiss plaintiff's complaint against them. [1]

Background

This lawsuit arises out of plaintiff Mark Babinski's acrimonious divorce from his former wife, defendant Zofia Babinski, and their subsequent disputes over the custody of their now 13 year-old

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[1]. Also before the court is plaintiff's motion for summary judgment against Zofia Babinski. However, because Ms. Babinski has not yet answered plaintiff's complaint, summary judgment is not available. Accordingly, the court has not considered the papers filed by plaintiff in support of this motion.

son Thomas. Plaintiff makes the following allegations in his complaint. [2]

Within one month after the judgment of divorce between plaintiff and his former wife was entered by the Superior Court of New Jersey, Union County on May 2, 1988, plaintiff sought increased visitation rights with Thomas. In considering plaintiff's application, the Honorable John M. Boyle entered a series of orders, requiring plaintiff, his former wife and Thomas to submit to psychiatric evaluations and counseling through the Family and Children's Counseling and Testing Center of Elizabeth, New Jersey (the "Center" or the "Elizabeth Counseling Center").

Although Zofia Babinski and Thomas were evaluated by the Center in August and September, they did not receive any follow-up counseling from the Center as ordered by Judge Boyle in October. As a result, Judge Boyle issued another order, directing Zofia Babinski and Thomas to undergo further evaluation and counseling at the Center. According to plaintiff's complaint, while Zofia and Thomas were evaluated in February of 1989, they never received any counseling at the Center. Cmplt. at 4.

Instead, plaintiff alleges that Zofia Babinski took Thomas to Personal Performance Consultants ("PPC"), a counseling service provided to her free of charge as an employee of the International Business Machines Corporation ("IBM"). At PPC, Thomas was seen by defendant Patricia Regucci, a

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[2]. The court notes that plaintiff's allegations tell a confusing and often inconsistent story.

therapist licensed by the State of New Jersey. Plaintiff alleges that defendant Regucci "provided counseling to Thomas fully aware that it was in preparation for his court ordered evaluation ... " Cmplt. at 4.

Plaintiff further alleges that the counseling provided by defendant Regucci was in "violations [sic] of the standards of her profession and that she knew "she was not to provide counseling, did so, brainwashing ... Thomas to instill in him good feelings to wards his mother and bad feelings towards [plaintiff]." Id. at 5.

On April 19, 1989, Judge Boyle held a hearing regarding plaintiff's application for increased visitation. Plaintiff maintains that "[a]s a result of the illegal counseling provided by Patricia Regucci to my son Thomas, Judge John M. Boyle denied me the requested expansion of visitation with Thomas." Cmplt. at 5-6. Specifically, plaintiff asserts in his complaint that:

> Therefore, on April 19, 1989 Hon. John M. Boyle, J.S.C., under the color of state law, custom and policy denied me the liberty of visitation with my son - without due process.
>
> ...
>
> I was denied my 14th Amendment protected rights by Judge Boyle because of the activities of Defendants Zofia Babinski, Patricia Regucci, John Akers and Rick Hellan. [3]

Id. at 6.

Seemingly contradicting his characterizations of defendant Regucci's counseling of Thomas as "illegal" and as in violation of Judge Boyle's orders that counseling be obtained at the Elizabeth Counseling Center, plaintiff alleges that although he initially viewed the counseling provided to Thomas by Patricia Regucci as unconnected to Judge Boyle's orders and as "additional, not Court ordered but merely voluntary, counseling," Cmplt. at 8, he changed his view of the counseling in the course of his professional negligence lawsuit against defendant Regucci filed in New Jersey state courts in 1990. [4] Id. At that time, plaintiff "became aware of [the] fact [that] Thomas was seen by Defendant Patricia Regucci because of Judge Boyle's Orders." Id.

Lastly, plaintiff alleges that defendant Regucci rendered services to Thomas pursuant to an agreement between IBM and PPC. According to plaintiff, "[t]he Agreement clearly shows that IBM management encouraged IBM employees to

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[3]. Perhaps contradicting himself, plaintiff alleges that he never heard of Patricia Regucci until, in response to a suit he filed in state court toward the end of 1989 in order to determine whether his former wife had undergone counseling as ordered by Judge Boyle, defendant Regucci submitted a letter stating that she had counselling sessions with Zofia and Thomas.

[4]. This suit was dismissed as to IBM and summary judgment granted in favor of Ms. Regucci.

make use of the services of PPC by contractual agreement and that there was a tight coupling of the management of the two companies." Cmplt. at 10. Plaintiff further alleges that:

> Ultimately, the responsibility for the conduct of Patricia Regucci, an employee of PPC, lies with Rick Hellan, President of PPC, who established and implemented policies and procedures to be used by PPC employees when providing services to children of divorced parents.
>
> Ultimately, the responsibility for the conduct of Zofia Babinski, an employee of IBM, lies with John Akers, Chairman of IBM. John Akers has not only implemented policies and procedures which permitted and encouraged violation of my civil rights but also, in name of affirmative action, encourage [sic] female IBM employees to support alternative lifestyles, destroy traditional family values and use various IBM company resources to intefere in private family matters.
>
> That is why Rick Hellan, in his capacity as President of PPC, and John Akers, in his capacity as Chairman of IBM, are named here as Defendants.

Id. at 11.

On December 31, 1992, plaintiff filed suit against defendants, asserting that their alleged actions violated his civil rights enforceable pursuant to 42 U.S.C. Section 1983. Plaintiff seeks compensatory and punitive damages,

especially from defendants Akers and Hellan, attorney's fees and injunctive relief. [5]

Discussion

Defendants Akers and Regucci move to dismiss plaintiff's complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) primarily on grounds that they are private actors not subject to suit under Section 1983, which imposes liability for violations of federal law only upon persons acting under color of state law. [6]

This court can only grant a motion to dismiss if, reading all inferences of the Complaint in plaintiff's favor, there is no set of facts on which plaintiff can prevail. Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Scheuer v. Rhodes, 416 U.S.

---

[5]. The court notes that as of the date of this opinion, service has not been executed as to defendant Hellan. Service has been executed as to the remaining three defendants, of whom only defendant Zofia Babinski has failed to answer plaintiff's complaint.

[6]. Defendant Akers further argues that plaintiff has failed to allege the deprivation of any federal right. Defendant Regucci also asserts that this action is barred under the doctrine of res judicata. However, the court cannot reach the merits of defendant's res judicata argument on a motion to dismiss as this would require examination of documents extraneous to the pleadings. See Fed. R. Civ. P. 12.

232, 236 (1974). As defendant Akers correctly notes in his brief to the court, the court need only accept as true allegations regarding the legal effect of events set forth in plaintiff's complaint. See C. Wright & A. Miller, Federal Practice and Procedure, Civil 2d Section 1357 at 319-20 (2d ed. 1990).

I. The Elements of a Section 1983 Claim

It is well settled that in order to state a claim upon which relief can be granted under Section 1983, a plaintiff must allege both that the conduct complained of deprived him of rights, privileges, or immunities secured by the Constitution or federal law and was committed by a person acting under color of state law. Parratt v. Taylor, 451 U.S. 527, 535 (1981), overruled on other grounds by Daniels v. Williams, 474 U.S. 327 (1986); see also Edwards v. City of Philadelphia, 860 F. 2d 538, 573 (3d Cir. 1988) (holding that in order to make a prima facie case under Section 1983, the plaintiff must demonstrate that an individual acting under color of state law deprived him of a federal right).

In an opinion that has been characterized as "opaque" by the Third Circuit, see Robb v. City of Philadelphia ,733 F. 2d 286, 288 (3d Cir. 1984), in Lugar v. Edmonson Oil Co., the United States Supreme Court undertook a complex analysis of the elements of a Section 1983 claim, considering at great length the relationship between the state action requirement of the Fourteenth Amendment, which makes federal constitutional rights available against the states, and the "under color of state law" component of Section 1983, which provides a remedy for

constitutional violations. 457 U.S. 922 (1982). The Lugar Court stated:

> Our cases have ... insisted that the conduct allegedly causing the deprivation of a federal right be fairly attributable to the State. These cases reflect a two-part approach to this question of 'fair attribution.' First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible ... Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the state.

Id. at 937. "Without a limit such as this", the Court added, "private parties could face constitutional litigation whenever they seek to rely on some state ruling governing their interactions with the community surrounding them." Id.

The Lugar Court pointed out that the requirements that the deprivation be caused by the state and that it actually occur at the hands of a state actor "collapse when the claim of constitutional deprivation is directed against a party whose official character is such as to lend the weight of the State to his official decisions." Lugar, 457 U.S. at 937. Indeed, when "a Section 1983 action is brought against a state official, the statutory requirement of action "under color of state law" and the

state action requirement of the Fourteenth Amendment are identical." Id. at 929. However, [t]he two principles diverge when the constitutional claim is directed against a party without such apparent authority, i.e., against a private party." Id. at 937.

In such a case, to survive a motion to dismiss, the Section 1983 plaintiff must allege that: 1) "the claimed deprivation has resulted from the exercise of a right or privilege having its source in state authority," i.e. a state deprivation; and, 2) that the ostensibly private party defendants "may be appropriately characterized as 'state actors.'" Id. at 939. Considering plaintiff's complaint in light of this analysis, it is clear that plaintiff's complaint fails on both counts.

A. State Deprivation

The gravamen of plaintiff's complaint is that he was deprived of his Fourteenth Amendment liberty interest in his son Thomas' care, custody and management when Judge Boyle denied plaintiff increased visitation rights, allegedly as a result of the "illegal" counseling provided to Thomas by defendant Regucci at the instigation of Thomas' mother, defendant Zofia Babinski, under the direction of defendant Hellan and paid for by IBM. Put another way, although the actual deprivation was Judge Boyle's decision to deny plaintiff increased visitation with Thomas, according to plaintiff, it was the conduct of the private party defendants in relation to the counseling activities that led to the deprivation.

With regard to this conduct, plaintiff repeatedly alleges in his complaint that defendant Zofia Babinski failed to comply with Judge Boyle's orders that she and Thomas obtain counseling at the Elizabeth Counseling Center. Plaintiff also alleges that defendant Regucci knew "she was not to provide counseling" to Thomas and that her counseling to Thomas was "illegal". Thus, plaintiff alleges that these defendants failed to heed Judge Boyle's orders, not that they acted in compliance with orders.

Accepting these allegations as true, as the court must in considering a motion to dismiss, the court concludes that plaintiff has failed to allege that his deprivation was "caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom he state is responsible." Lugar, 457 U.S. at 937 (emphasis added). A discussion of the facts and holdings of Lugar makes this clear.

At issue in Lugar was a Virginia statute permitting private parties to obtain pre-judgment attachment of property under certain circumstances. In his complaint against the private parties that made use of this statute against him, the plaintiff alleged "that the deprivation of property resulted from [defendants'] 'malicious, wanton, willful, opressive [sic], [and] unlawful acts." Lugar, 457 U.S. at 940. "By 'unlawful,'" the Court concluded, "[plaintiff] apparently meant 'unlawful under state law.'" Id. In determining that plaintiff has thus failed to allege that defendants' alleged deprivation could be fairly attributed to the State of Virginia, the Court stated:

> To say [that the conduct was 'unlawful under state law'] is to say that the conduct of which [plaintiff] complained could not be ascribed to any governmental decision; rather [defendants] were acting contrary to the relevant policies articulated by the State.

457 U.S. at 940. Accordingly, plaintiff's complaint alleged no state involvement in the alleged deprivation and therefore did "not state a cause of action under Section 1983 but challenged only private action." Id.

Similarily, the plaintiff in this case has alleged that Thomas' counseling sessions with defendant Regucci were "illegal" and in violation of Judge Boyle's orders that the counseling take place at the Elizabeth Counseling Center. As such, defendants' alleged activities with regard to Thomas' counseling are wholly unrelated to any law, action or procedure implemented by the State of New Jersey. Because plaintiff has failed to allege that defendants' activities are related to any activity by the State, and indeed has alleged that defendants' activities were contrary to orders issued by a New Jersey judge, plaintiff cannot have been deprived of any Fourteenth Amendment liberty interest by defendants' activities. Accordingly, it would seem clear that the court must dismiss plaintiff's complaint as to all defendants. [7]

---

[7]. Although only defendants Regucci and Akers have sought dismissal, it is clear upon review of the complaint that the allegations relevant to the court's consideration of the state action issues apply equally to all of the defendants to this lawsuit.

Before reaching this conclusion, however, the court deems it necessary to discuss plaintiff's allegation, which contradicts all of his other allegations, that in the course of his state court professional negligence lawsuit against defendant Regucci he "became aware of [the] fact [that] Thomas was seen by Patricia Regucci because of Judge Boyle's Orders." Cmplt. at 8.

By this allegation, plaintiff seems to suggest, albeit contrary to all of his other allegations, that defendant Regucci's counseling of Thomas resulted from Judge Boyle's orders, rather than being in violation of these orders. However, even taking this allegation in the light most favorable to plaintiff, this allegation does not save plaintiff's complaint.

It is well-settled in this Circuit that a private decision can only be attributed to a state when the state "'has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the [state].'" Robinson v. Canterbury Village, Inc., 848 F.2d 424, 428 (3d Cir. 1988) (quoting San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522, 546 (1987)).

As plaintiff alleges throughout his complaint without inconsistency, Judge Boyle's orders all directed that Thomas be evaluated and receive counseling at the Elizabeth Counseling Center. As such, Judge Boyle's orders simply cannot be characterized as having compelled the counseling Thomas received from defendant Regucci. Absent this compulsion, defendants' alleged activities cannot be fairly attributed to the State of New

Jersey and thus plaintiff's Section 1983 complaint must be dismissed for failing to state a claim upon which relief can be granted.

B. Under Color of State Law

Even assuming that plaintiff's allegations cleared the first hurdle and sufficiently alleged a deprivation related to state activity, plaintiff's complaint would still be subject to dismissal for failing to allege that defendants acted under color of state law, the second element of a Section 1983 claim.

In National Collegiate Association v. Tarkanian, 488 U.S. 179 (1988), the Supreme Court set forth the general parameters of action taken under color of state law. The Court stated:

> 'Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law.'

Id. at 191 (quoting United States v. Classic, 313 U.S. 299, 326 (1941)). The Court added:

> In the typical case raising a state-action issue, a private party has taken the decisive step that caused the harm to the plaintiff, and the question is whether the state was sufficiently involved to treat that decisive conduct as state action. This may occur if the State creates the legal framework governing conduct, if it delegates its authority to the private actor,

> or sometimes if it knowingly accepts benefits derived from unconstitutional behavior.

Id. at 192. However, in Tarkanian, the final act challenged was action taken by a state university, which is clearly a state actor. Thus, the Court found that the question before it was not whether the university "participated to a critical extent in the [defendant's] activities, but whether [the university's] actions in compliance with the [defendant's] rules and recommendations turned the [defendant's] conduct into state action." Id. at 193.

This case is like Tarkanian in that the final act challenged by plaintiff is the decision by Judge Boyle, clearly a state actor, not to increase plaintiff's visitation rights with Thomas. It is also like Tarkanian in that plaintiff seeks to hold defendants, who are private actors, liable for the alleged influence that defendant Regucci's alleged "brainwashing" of Thomas had on Judge Boyle's decision.

Finally, this case is like Tarkanian in that this court concludes that the alleged connection between defendant Regucci's counseling of Thomas and Judge Boyle's decision to deny plaintiff increased visitation rights, as a matter of law, does not render the activities by the defendants to this action in connection with that counseling state action. If defendants' alleged actions were to be deemed state action in this context, the law would have to be that all persons who participate in proceedings before state officials or who contribute to the decisions made by state officials -- lobbyists, witnesses,

experts, etc. -- are state actors. Because this is not the law, plaintiff's complaint has failed to allege that defendants acted under color of state law.

II. Leave to Amend

Finally, the court must consider plaintiff's request that, in the event that the court finds his original complaint to be defective, which is the case for reasons discussed supra, the court permit him to file an amended complaint "that would be sufficient to cure the deficiency as to 'factual specificity' and the nature of the claim." Plt. Opposition to Akers at 13.

As a general matter, the United States Supreme Court has stated that courts should freely grant leave to amend a complaint when justice requires. Foman v. Davis, 371 U.S. 178, 182 (1962). A factor to be considered in determining whether justice so requires is the utility or futility of such amendment. See id. (stating that "[i]f the underlying factors or circumstances relied upon by plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits.").

In the Third Circuit, a Section 1983 plaintiff whose complaint is dismissed for lack of specifdicity must be given a reasonable opportunity to cure the defects in his complaint. Darr v. Wolfe, 767 F.2d 79, 81 (3d Cir. 1985).

In considering plaintiff's complaint in light of these principles, the court concludes that plaintiff should not be granted leave to amend his complaint.

Plaintiff's complaint does not suffer from a lack of specificity. Rather, plaintiff's very detailed complaint alleges facts that, taken as true, provide no basis for any legal relief. As such, amendment would be clearly futile.

Furthermore, permitting plaintiff to amend his complaint, which would ultimately require the court to expend scarce resources in reviewing plaintiff's pleadings again, encroaches on the rights of those litigants with claims that deserve the court's attention.

For these reasons, the court denies plaintiff's request that he be granted leave to amend his complaint.

Conclusion

For the foregoing reasons, the court hereby grants defendant Akers' and Regucci's motion to dismiss plaintiff's complaint, denies plaintiff's motion for summary judgment against defendant Zofia Babinski and, upon its own motion, dismisses plaintiff's complaint as to defendants Zofia Babinski and Rick Hellan. Plaintiff's complaint is dismissed in its entirety with prejudice.

/signature: H. Lee Sarokin/

H. Lee Sarokin
U.S. District Judge

Date: August 11, 1993

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 93-5554

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MARK BABINSKI,
Appellant

v.

PATRICIA REGUCCI; ZOFIA BABINSKI; JOHN AKERS, Chairman, IBM Corp.; RICK HELLAN, President, PPC Inc.

---

On Appeal From the United States District Court For the District of New Jersey
(D.C. Civil Action No. 92-cv-05510)
District Judge: Honorable H. Lee Sarokin

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Submitted March 11, 1994

BEFORE: STAPLETON, HUTCHINSON and ROTH,
Circuit Judges

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JUDGMENT ORDER

After consideration of the contentions raised by appellant, it is

ORDERED AND ADJUDGED that the judgment of the district court entered August 12, 1993, be and is hereby affirmed.

Costs taxed against appellant.

By the Court,

/signature: Walter K. Stapleton/

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Circuit Judge

ATTEST:

/signature: P. Douglas Sisk/

Clerk

Dated: May 5 - 1994

Certified as a true copy and issued in lieu of a formal mandate on May 27, 1994.

Teste: /signature: P. Douglas Sisk/

Clerk, U.S. Court of Appeals for the Third Circuit

Supreme Court, U.S.
FILED
OCT 12 1994

No. 94-0471

In The

# Supreme Court of the United States

October Term, 1994

MARK BABINSKI,

*Petitioner,*

*vs.*

PATRICIA REGUCCI, ZOFIA BABINSKI, JOHN AKERS, Chairman, IBM CORPORATION, RICK HELLAN, President and PPC, INC.,

*Respondents.*

*On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit*

## RESPONDENTS' BRIEF IN OPPOSITION

ROGER ELLIS
*Counsel of Record*
BUMGARDNER, HARDIN & ELLIS
*Attorneys for Respondents*
673 Morris Avenue
Springfield, New Jersey 07081
(201) 564-6500

5710
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

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## COUNTERSTATEMENT OF QUESTIONS PRESENTED

Absent any evidence of conspiracy, does a private actor become a state actor under 42 U.S.C. § 1983 by providing counseling services to a mother and child in a state custody case in violation of a court order specifying where counseling is to take place?

If so, does this state actor deprive another of his constitutional rights in violation of 42 U.S.C. § 1983 by providing such services?

## LIST OF PARTIES

No additional parties other than those named in the Petition.

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## STATEMENT OF THE CASE

The respondent, Ms. Patricia Regucci (hereinafter "Regucci"), a licensed social worker and an employee of Personal Performance Consultants (hereinafter "PPC") rendered counselling services to Mr. Babinski's ex-wife Zofia Babinski and their son Thomas Babinski as part of a free service from the IBM Employee Assistance Program. Mr. Babinski, however, has characterized these events as part of an overall conspiracy aimed at "brain washing" his son Thomas Babinski so that his application for extended visitation rights before the Honorable John M. Boyle (Superior Court of New Jersey, Family Division, Docket No. FM-10482-88) would be denied. (1a)[1]. Mr. Babinski continues in averring that the counselling services provided by Regucci and PPC in some manner or another constitutes a viable action under 42 U.S.C. § 1983. (6a).

PPC is a privately owned and operated counselling group under contract with IBM to provide their services for the IBM Employee Assistance Program. (46a). Regucci was at all times an employee of PPC engaged in providing private family counselling services and any actions taken by her were taken in her capacity as an employee of PPC and not as a state or federal government employee or agent. In his District Court action and subsequent appeal to the Third Circuit, Mr. Babinski failed to present a scintilla of evidence to the respective courts alleging either Regucci or PPC ever engaged in any activities for, or with, any state or federal government agency or institution or engaged in any activities in violation of state or federal law in connection with counselling services provided for Zofia or Thomas Babinski.[2] (21a).

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1. All references are to Respondent's Appendix *infra.*

2. Additionally, Mr. Babinski filed claims alleging malpractice on behalf of Regucci and PPC for malpractive which were summarily dismissed and deemed frivolous under N.J.S.A. 2A:15-59.1.

Unfortunately, Mr. Babinski does not accept the fact that despite over five years of litigation in both state and federal court accompanied by repeated discovery demands the plain truth remains: Regucci and PPC never acted to deny Mr. Babinski any rights or privileges under state or federal law, nor was there ever any conspiracy to deny Mr. Babinski any rights or privileges available to him. (24a).

In his Complaint Mr. Babinski seeks to impose liability on Ms. Regucci and PPC for violating his civil rights pursuant to 42 U.S.C. § 1983 and he further seeks to recover attorney's fees and costs pursuant to 42 U.S.C. § 1988. (11a). As the Court is aware, Judge Sarokin issued an opinion on August 11, 1993 (Civ. No. 92-5510 (HLS)) dismissing Mr. Babinski's Complaint in its entirety as to all defendants. (26a). The Court ruled from the outset "that plaintiff's allegations tell a confusing and often inconsistent story." (13a). The Court of Appeals for the Third Circuit affirmed the District Court's dismissal of the complaint in its entirety without opinion. (47a). Regrettably, the respondents PPC and Ms. Regucci have been subject to vexatious legal proceedings due to the ever changing nature of Mr. Babinski's story.

Judge Sarokin's opinion of August 11, 1993 thoroughly and accurately reflects the issues presented in the case at bar providing ample legal justification for the dismissal of this § 1983 action in a perfunctory manner. Judge Sarokin's refused to allow the petitioner to amend his § 1983 Complaint as provided in *Darr v. Wolfe*, 767 F.2d 79, 81 (3rd Cir. 1985). Appropriately, Judge Sarokin concluded his opinion by stating:

> Plaintiff's Complaint does not suffer from a lack of specificity. Rather, plaintiff's very detailed Complaint alleges facts that, taken as true, provide no basis for any legal relief. As such, amendment would be futile.

(25a).

In sum, the appellee's firmly believe that Judge Sarokin's ruling objectively evaluated the facts in this case and faithfully applied the law. To that end, Ms. Regucci and PPC respectfully request the Court to enter judgment denying Mr. Babinski's petition for certiorari.

**A. Statement of Facts**

On May 2, 1988 a Judgment of Divorce/Property Settlement Agreement was formally entered into between the petitioner Mark Babinski, and Zofia Babinski in the Superior Court of New Jersey, Family Division. (2a). Shortly thereafter, in June of 1988 Mr. Babinski made an application to the above-mentioned court seeking to expand his visitation rights with his son Thomas. (2a).

Upon receipt of Mr. Babinski's application, Judge Boyle ordered Mark, Zofia, and Thomas Babinski to obtain psychiatric counselling and evaluations from the Elizabeth Family and Children's Counselling & Testing Center to facilitate the court's determination in the matter. (3a). During the course of the expansion of visitation rights proceedings, Zofia Babinski, an employee of IBM, received free family counselling services from respondents Regucci and PPC as part of the IBM Employee Assistance Program. (46a). Zofia Babinski's son, Thomas, accompanied her on two visits to Regucci and PPC. Upon completion of evaluations by the Elizabeth Family and Children's Counselling & Testing Center, a plenary hearing was held on April 19, 1989 before Judge Boyle and Mr. Babinski was denied expansion of visitation.

What followed Judge Boyle's ruling were a series of actions filed in both the state and federal courts of New Jersey by Mr. Babinski against his former wife, his adopted son, his former's wife's employer (IBM), his former's wife's legal counsel, an ex-associate of his former wife's legal counsel, IBM's New Jersey

legal counsel, judges at three levels of the New Jersey state court system who have ruled upon his claims, including the New Jersey Supreme Court, IBM's former chief executive officer, and the respondents Regucci and PPC.

In the case at bar, Mr. Babinski has attempted to allege a violation of 42 U.S.C. § 1983 on behalf of Regucci and PPC in providing the counselling services. (11a). On August 11, 1993 in a written opinion Judge Sarokin dismissed Mr. Babinski's Complaint in its entirety. On May 5, 1994, the Third Circuit affirmed the District Court's decision without opinion. (47a). Regucci and PPC continue to maintain all actions filed against them by Mr. Babinski are wholly frivolous and request the Court to enter judgment denying certiorari.

## SUMMARY OF ARGUMENT

The petitioner Mark Babinski has failed to state a claim under 42 U.S.C. § 1983. According to this statute, in order for a plaintiff to sustain his cause of action, he must prove that the defendant has acted under color of state law to deprive the plaintiff of a federally protected right. Respondent Patricia Regucci is being sued in her capacity as a licensed therapist employed by a private company. Her status does not make her a state actor under the auspices of 42 U.S.C. § 1983.

Moreover, there is no evidence that respondent Patricia Regucci participated in a conspiracy or engaged in a joint action with a state actor. The plaintiff claims that Ms. Regucci conspired with the co-defendant Zofia Babinski and Judge Boyle, both state actors he claims, to deprive him of his constitutional rights. Even assuming what the defendant asserts is true, that these two individuals are state actors (which he has not shown) there is no evidence that any conspiracy took place between these parties. Hence the plaintiff's claim for jurisdiction under 42 U.S.C. § 1983 fails on this ground as well.

The issue in this case is straightforward, and therefore respectfully the Third Circuit's order affirming the District Court's opinion should be affirmed. Contrary to the petitioner's jurisdictional statement, there is no conflict among the various federal Circuit Courts on this issue. The courts have clearly specified when a state actor has deprived a plaintiff of his constitutional rights under color of state law. There are extensive court opinions on this issue, none of which conflict on this issue.

The petitioner attempts to create a conflict among the Circuits through his interpretation of Judge Sarokin's decision, affirmed by the Third Circuit. Judge Sarokin did not deny the petitioner's claim because his wife as a state actor who omitted to perform an act she was legally required to do, but denied his claim because the court found his wife's actions never amounted to state action, stating ". . . defendants' alleged activities cannot be fairly attributed to the State of New Jersey, and thus plaintiff's 1983 claim must be dismissed for failing to state a claim upon which relief can be granted." Thus the conflict among the Circuit Courts which the petitioner implies in his jurisdictional statement does not exist.

## REASONS FOR DENYING THE WRIT

### I.

### PETITIONER HAS FAILED TO STATE A CLAIM UNDER 42 U.S.C. § 1983.

Petitioner alleges that Regucci and PPC are liable under 42 U.S.C. § 1983. (11a). The statute provides in relevant part:

> every person who, under color of any statute, ordinance, regulation, customer usage, of a state or territory or the District of Columbia, subjects, or causes to be subjected, any citizen

> of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law suit in equity or other proper proceeding for redress.

42 U.S.C. § 1983.

The threshold requirement of 42 U.S.C. § 1983 is that the plaintiff has acted under color of state law to deprive the plaintiff of a federally protected right. *Parratt v. Taylor,* 451 U.S. 527, 535 (1981); *Daniels v. Williams,* 474 U.S. 327 (1986).

According to the court in *Sullivan,* to satisfy the "under color of state law" requirement:

> § 1983 looks to personal action and deprivation of constitutional rights rather than damage alleged by a chain of various responsibility. . .
>
> Furthermore, this personal action must be fairly attributable to the state, so that the under color of state law requirement of 1983 parallels the state action requirements of the 14th amendment.

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*Sullivan v. State of New Jersey Div. of Gaming Enforcement,* 602 F. Supp. 1216, 1220-21 (D. N.J. 1985), *aff'd,* 853 F.2d 921 (3rd Cir. 1988) (citations omitted) (emphasis in original added); *see also, Church of Human Potential, Inc. v. Vorsky,* 636 F. Supp. 93, 96 (D. N.J. 1986) ("conduct satisfying the state action requirement of the 14th amendment also constitutes action under color of state law within the meaning of § 1983").

A private employer is not liable under section 1983 for its actions unless those actions were committed under color of state law. *Wood v. Exxon Corp.*, 674 F. Supp. 1277, 1284 (S.D. Tex. 1987); *Baker v. McDonald's Corp.*, 686 F. Supp. 1474, 1479 (S.D. Fla. 1987), *aff'd*, 865 F.2d 1272 (11th Cir. 1988), *cert. denied*, 493 U.S. 812 (1989) (absent evidence that the employer was anything but a private corporation, no claim existed against employer under 1983).

Private persons act under color of state law, for civil rights purposes, only when they conspire with or willfully participate in joint action with state officials to deprive others of constitutional rights. *United Steel Workers of America v. Phelps Dodge Corp.*, 865 F.2d 1539, 1540 (9th Cir. 1989), *cert. denied*, 493 U.S. 809 (1989); *Malak v. Associated Physicians, Inc.*, 784 F.2d 277, 281 (7th Cir. 1986); *Hauptmann v. Wilentz*, 570 F. Supp. 351, 381 (D. N.J. 1983), *aff'd*, 770 F.2d 1070 (3rd Cir. 1985), *cert. denied*, 474 U.S. 1103 (1986). *See also, Church of Human Potential*, 636 F. Supp. 96 ("[a] person acts under color of state law when exercising power possessed by virtue of state law and made possible only because the wrongdoer is closed with the authority of state law").

Joint action is one of the means by which action by private parties may be "fairly attributable to the state." *Hauptmann*, 570 F. Supp. 381, n. 29, *citing Lugar v. Edmondson Oil Company*, 457 U.S. 922 (1982). Private action may also be attributed to the state when:

> (1) the state and the private party maintain a "symbiotic" relationship;
>
> (2) there is a "close nexus" between the state and the challenged action of the private party; or

> (3) a private entity exercised a traditionally state function.

*Id.* (citations omitted).

Allegations of conspiracy are another means of demonstrating that a private party acted under color of state law. Such allegations under the federal civil right statutes must be pled with factual specificity.[3] *Hauptmann,* 570 F. Supp. 381; *see also, United States v. City of Philadelphia,* 644 F.2d 187 204 (3rd Cir. 1980). Vague and conclusory allegations in civil rights complaints should not survive a motion to dismiss as in the instant case. *Hauptmann,* 570 F. Supp. 381 *citing United States v. City of Philadelphia,* 644 F.2d 204; *Hall v. Pennsylvania State Police,* 570 F.2d 86, 89 (3rd Cir. 1978).

To have survived the motion to dismiss under section 1983, Mr. Babinski must have alleged with sufficient factual particularity that "the private party and state actor have reached some explicit or tacit understanding or agreement to deprive the plaintiff of a federal right." *Hauptmann,* 570 F. Supp. 382 (citations omitted). *See also, United Steel Workers of America,* 865 F.2d 1540-41. According to the court in *Chicarelli v. Plymouth Garden Apartments,* 551 F. Supp. 532, 539 (E.D. Pa. 1982):

> [i]t is not enough . . . for a plaintiff to make merely broad or conclusory allegations concerning the existence of such a conspiracy or to show only that a state official took some action which was in some way unfavorable to him. Neither is it enough to show that the

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3. This rule directly applies to *pro se* plaintiffs. *See, e.g., Mokone v. Fenton,* 710 F.2d 998, 1002 (3rd Cir. 1983); *Ross v. Meagan,* 638 F.2d 646, 650 (3rd Cir. 1981); *Rosquist v. Jarratt Construction Corp.,* 570 F. Supp. 1206 (D.N.J. 1983).

> private and state actors might have had a common goal or acted in concert, unless there is a showing that they directed themselves toward an unconstitutional action by virtue of a mutual understanding or agreement. Rather, plaintiffs must allege with sufficient particularity and show with specific material facts the private party and a state official or actor reached some understanding or agreement, or plotted, planned and conspired together, to deprive plaintiffs of a federal right.

*Id.* at 539 (citations omitted). *See also, Hauptmann,* 570 F. Supp. 382.

A "§ 1983" action is unable to survive where the alleged deprivation of a federally protective right results only indirectly, if at all, from the conduct of state officers. *Sullivan,* 602 F. Supp. 1220. To impose liability under such circumstances would be "to engage in an unwarranted expansion of the reach of 1983." *Id.* According to Judge Gerry:

> [a]lthough the language of the statute itself which imposes liability on a state officer who subjects or *causes* to be subjected another to a constitutional deprivation could be broadly interpreted to allow an action whenever a state officer is indirectly involved the chain of events leading to plaintiff's harm, the courts have not read § 1983 in this way. This reluctance to impose liability for indirect involvement underlies the Third Circuit rule that liability may not be imposed in § 1983 suits on the basis of *respondeat superior.*

*Id.* (citations omitted) (emphasis in the original).

The allegations against Ms. Regucci do not create a cause of action under 42 U.S.C. § 1983. Ms. Regucci is a licensed therapist employed by a private company and at all times acted as a private person. Any injury which petitioner allegedly sustained as the result of Ms. Regucci's alleged actions is not a deprivation attributable to a person acting "under color of state law, as required by § 1983."

Mr. Babinski does not even allege that Ms. Regucci acted "under color of state law." (6a). He merely alleges that Judge Boyle, acting "under color of state law", custom and policy denied [him] the liberty of visitation with son Thomas — without due process." (6a). He claims that he was "denied [his] 14th amendment protected rights by Judge Boyle because of the activities of Defendants. This is the cause of action against Defendants . . . Patricia Regucci . . ." (6a).

Assuming for purposes of this motion, that Judge Boyle denied the petitioner his Fourteenth Amendment rights "because of the activities of defendants," as petitioner alleges, such action is not sufficient to demonstrate that Ms. Regucci acted "under color of state law." Merely because Judge Boyle was indirectly involved in the "chain of events leading to the plaintiff's harm" does not transform alleged acts by Ms. Regucci or PPC into state action for section 1983 purposes. *See Sullivan,* 602 F. Supp. at 1220.

Here, there is no factual basis to assert that Ms. Regucci and PPC participated in a conspiracy or engaged in a joint action with a state actor. (24a). Moreover, mere allegations that a state official took some action which was in some way unfavorable to the petitioner is insufficient to allege conspiracy for § 1983 purposes. *See Chicarelli,* 551 F. Supp. 539. Likewise, a private citizen is not liable for the decisions of the court even if those decisions are incorrect. A judge, acting in his judicial capacity, is immune from suit seeking damages under 42 U.S.C. § 1983. *Pierson v. Ray,* 386

U.S. 547, 554 (1967); *McAllister v. State of New Jersey,* 396 F.2d 776, 777 (3rd Cir. 1968) (the judge is immune even where his decisions were allegedly wrong). *See Stump v. Sparkman,* 435 U.S. 349, 356-57 (1978); *see also, Font v. Dapena Wordan,* 763 F. Supp. 680, 682 (D.P.R. 1991), *aff'd,* 946 F.2d 880 (1st Cir. 1991) (judges who ruled against father in child support proceedings were entitled to immunity in father's section 1983 action).

Mere reliance by the court upon information provided by or actions taken by a private party does not render the private party a state actor for section 1983 purposes. *See Chiles v. Crooks,* 708 F. Supp. 127, 130-31 (D.S.C. 1989). Furthermore, a state judge's action and alleged violation of law can not be remedied by § 1983 where only a private party is charged and the state judge is not a defendant. *Taylor v. Gilmartin,* 686 F.2d 1346, 1355, n.3 (10th Cir. 1982), *cert. denied,* 459 U.S. 1147 (1983), *citing Lugar v. Edmondson Oil Co.,* 457 U.S. 922 (1982).

Similarly, allegations of independent conduct cannot sustain a conspiracy allegation under the federal civil rights statutes. *See Ammlung v. City of Chester,* 494 F.2d 811, 814 (3rd Cir. 1974) (dismissing a complaint where "there are no allegations of a combination, agreement, or understanding among all or between any of the defendants", and "no factual allegations that the defendants plotted, planned or conspired together"); *Steward v. Meeker,* 459 F.2d 699, 670 (3rd Cir. 1972) (dismissing a complaint alleging "wrongdoing on the part of [defendant] alone").

In sum, Mr. Babinski has failed to prove that Ms. Regucci and PPC's conduct caused a deprivation of a federal right that is fairly attributable to the state. The two critical elements necessary to maintain a claim under 42 U.S.C. § 1983 set out in *Lugar v. Edmondson Oil Co.,* 457 U.S. 922 (1982) are clearly absent. The Court in *Lugar* established in prong one:

> [t]he deprivation must be caused by the

> exercise of some right or privilege created by the state or by a rule of conduct imposed by the state or by a person for whom the state is responsible.

457 U.S. 937.

The second prong in *Lugar* requires proof that:

> [t]he party charged with the deprivation must be a person who may fairly be said to be a state actor . . . state official . . . obtain significant aide from state officials, or . . . whose conduct is otherwise chargeable to the state.

*Id.*

In applying the holding in *Lugar* to the instant facts, Ms. Regucci has never been shown to be anything other than an employee of a private company, namely PPC; and the actions allegedly taken by her were in no way "chargeable to the state" or directed toward depriving or denying Mr. Babinski of any rights or privileges available to him under federal law or the laws of the State of New Jersey. Therefore, the allegations against Ms. Regucci and PPC do not state a cause of action under 42 U.S.C. § 1983.

## CONCLUSION

Based on the foregoing reasons, respondents Regucci and PPC respectfully request the Supreme Court deny the petitioner's petition for certiorari.

Respectfully submitted,

ROGER G. ELLIS
*Counsel of Record*
BUMGARDNER, HARDIN & ELLIS
*Attorneys for Respondent*
673 Morris Avenue
Springfield, New Jersey 007081
(201) 564-6500

## APPENDIX A — BABINSKI COMPLAINT

Mark Babinski, Pro Se
85 5th Ave., Garwood, N.J. 07027
(908) 654-0596

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CIVIL ACTION NO. _____

MARK BABINSKI

Plaintiff

vs.

PATRICIA REGUCCI
ZOFIA BABINSKI
JOHN AKERS
Chairman, IBM Corp.
RICK HELLAN
President, PPC, Inc.

Defendants

COMPLAINT
and Demand for Jury Trial

PARTIES

Mark Babinski, 85 5th Ave., Garwood, New Jersey 07027

Patricia Regucci, 48 George Street, Harrington Park, New Jersey 07640

*Appendix A*

Zofia Babinski, 623 Rosewood Ter., Linden, New Jersey 07036

John Akers, Chairman, IBM Corp., Old Orchard Rd., Armonk, New York 10504

Rick Hellan, President, Personal Performance Consultants, Inc. 1401 South Brentwood Blvd., St. Louis, Missouri 63144

JURISDICTION

This civil action arises under the 14th Amendment to the Constitution of the United States. Two of the Defendants are citizens of States other than the State in which Plaintiff resides. Damages are demanded from Defendants pursuant to federal Civil Rights law 42 U.S.C. 1983 and 42 U.S.C. 1988. Therefore, the federal court has jurisdiction in this matter.

CAUSE OF ACTION

Defendant Zofia Babinski and I (Plaintiff) were divorced on May 2, 1988 and a Final Judgment of Divorce/Property Settlement Agreement was entered in Superior Court of N.J., Union County, on June 20, 1988. Zofia Babinski and I were granted Joint Custody of son Thomas Babinski, then age 8. Shortly thereafter Defendant Zofia Babinski reneged on her verbal agreement to permit me to see my son Thomas beyond times specified in the Divorce Agreement. In June 1988 I filed action in the Union County Superior Court, N.J., to expand my visitation with son Thomas.

On July 22, 1988 Hon. John M. Boyle, J.S.C. signed an Order compelling Zofia Babinski, Thomas and myself to submit to a psychiatric evaluation within 30 days, in preparation for a hearing

on expanding my visitation rights. on August 18, 1988 Judge John M. Boyle signed an Order that "all therapy and evaluations shall be conducted by and through the *consortium* and as further directed by this Court". By "consortium" the Judge meant the Family and Children's Counseling and Testing Center of Elizabeth, N.J.. The services provided by the consortium were based on a contract between the County of Union and the Family Services Consortium.

In August and September 1988 evaluations of Zofia Babinski, Thomas Babinski and myself were conducted by the Family and Children's Counseling and Testing Center. The results of these evaluations were provided by letter dated October 25, 1988 to Judge John M. Boyle.

On October 28, 1988 a Plenary Hearing was held before Judge John M. Boyle. As a result of the hearing Judge Boyle ordered that we immediately follow all recommendations provided by the Family and Children's Counseling and Testing Center. The Order was signed by Judge Boyle on November 18, 1988 and required me, Thomas Babinski and Zofia Babinski to obtain psychotherapy, another evaluation by the Family and Children ' s Counseling and Testing Center and set "January 28, 1989 or sooner if the Court's schedule so allows" for another plenary hearing to decide on my request for significant increase in visitation schedule.

I complied with Judge Boyle's November 18, 1988 Order and had a series of counseling sessions. By letter dated January 19, 1989 the Family and Children's Counseling and Testing Center informed Judge Boyle about my counseling but stated that "with regard to Mrs. Babinski and the child, Thomas, we have no record that Mrs. Babinski contacted our office to schedule follow-up evaluation and treatment for herself and her son".

*Appendix A*

Hon. John M. Boyle received the January 19, 1989 letter on January 25, 1989, one day prior to the Plenary Hearing. The Plenary Hearing was cancelled. on January 26, 1989 Judge John M. Boyle entered an Order in which he ordered that "Zofia Babinski, immediately make an appointment for [herself] [the infant child, Thomas,] for an evaluation, therapy and counselling through the Family & Childrens Counselling and Testing Center" and "that copies of the findings and recommendations are provided to this Court without delay".

Defendant Zofia Babinski made a February 7, 1989 appointment for herself and a February 13, 1989 appointment for my son Thomas for *evaluations* at the Family and Children's Counseling and Testing Center. Results of these evaluations were provided to Judge Boyle in preparation for a new Plenary Hearing dealing with expanding my visitation rights with son Thomas.

However, Defendant Zofia Babinski did not comply with Judge Boyle's January 26, 1989 Order regarding herself and Thomas being provided with *counseling* through the Family and Children's Counseling and Testing Center. Neither she nor my son Thomas received any counseling or therapy through that organization.

Instead, on February 9, 1989 (just 4 days prior to Thomas' evaluation by the Family and Children's Counseling and Testing Center) Defendant Zofia Babinski took my son Thomas for counseling to Defendant Patricia Regucci, an employee of Personal Performance Consultants, Inc. ("PPC"). Defendant Rick Hellan is President of PPC. International Business Machines Corporation ("IBM") paid for the services rendered by PPC to my son Thomas Babinski and Defendant Zofia Babinski. Defendant John Akers is Chairman of IBM.

*Appendix A*

Defendant Patricia Regucci provided counseling to my son Thomas fully aware that it was in preparation for his Court ordered evaluation on February 13, 1989 and a future Plenary Hearing regarding my visitation rights. Defendant Patricia Regucci provided counseling to Thomas in presence of his mother Defendant Zofia Babinski and his half-brother Robert Babinski, in violations of the standards of her profession. Most importantly, Patricia Regucci fully aware that under Court Orders she was not to provide counseling, did so, brainwashing my son Thomas to instill in him good feelings towards his mother and bad feelings towards me.

Based on prior experience, by letter dated February 15, 1989 I expressed my concern to Judge John M. Boyle that his Orders were not complied with in the past by Defendant Zofia Babinski and that again the same situation may be happening. In response, on February 16, 1989 the office of Judge Boyle contacted Richard H. Kress, attorney for Defendant Zofia Babinski and "[a]dvised Kress 2/16/89 to comply".

By letter dated April 5, 1989 attorney for Defendant Zofia Babinski advised Judge John M. Boyle that Zofia Babinski "has been continuing with her therapy and has followed through with the recommendations of the Family and Children's Counseling and Testing Center". A copy of this letter was forwarded to me. Both Judge Boyle and I were misled by Defendant Zofia Babinski tobelieve that she complied with Judge Boyle's Orders regarding counseling, therapy and evaluation.

By letter dated April 7, 1989 the Court Assignment Clerk informed me that a Plenary Hearing regarding my visitation rights will be held on April 19, 1989 before Judge John M. Boyle.

*Appendix A*

On April 19, 1989 a Plenary Hearing was held regarding expansion of my visitation rights with son Thomas. As a result of the illegal counseling provided by Patricia Regucci to my son Thomas, Judge John M. Boyle denied me the requested expansion of visitation withThomas.

As the parent of Thomas Babinski I have a well established (by virtue of U.S. Supreme Court decisions) fundamental liberty interest in the care, custody, visitation and management of my minor son Thomas. This right was reinforced on State level by the fact that at divorce time I was granted Joint Custody of Thomas. It is a custom and policy of the New Jersey State Courts to seek psychological/psychiatric counseling, therapy and evaluations of parents and children in custody/visitation matters. The power to make such appointments in family matters is codified by N.J. Court Rule *R.*5:3-3.

Therefore, on April 19, 1989 Hon. John M. Boyle, J.S.C., under the color of state law, custom and policy denied me the liberty of visitation with son Thomas — without due process. Due process was well established by the sequence of Judge Boyle's August 18, 1988, November 18, 1988, January 26, 1989 Orders and further instructions of February 16, 1989. I was denied my 14th Amendment protected rights by Judge Boyle because of the activities of Defendants. This is the cause of action against Defendants Zofia Babinski, Patricia Regucci, John Akers and Rick Hellan.

At the time of the April 19, 1989 Plenary Hearing neither Boyle nor I were aware that Defendant Zofia Babinski disbeyed Judge Boyle's Orders regarding counseling and therapy or my son Thomas or herself.

*Appendix A*

However, since Defendant Zofia Babinski, for no apparent cause, continued to violate even the limited visitation rights I had with Thomas after the April 19, 1989 Plenary Hearing started suspecting that *she* had not undergone the counseling ordered by Judge Boyle for her disorders. At the end of 1989 I filed a Notice of Motion in Union County Superior Court demanding that proof of Defendant Zofia Babinski receiving such counseling be provided.

On January 12, 1990 Hon. Renee Weeks, J.S.C. signed an Order that Defendant Zofia Babinski provide the Court with such proof. In March 1990 Defendant Zofia Babinski, supplied the Court and me with a one sentence February 22, 1990 letter from Defendant Patricia Regucci stating "Re: Zofia Babinski [. . .] The above named was seen for counseling in my office with her sons.". *This was the first time I ever heard of Patricia Reaucci or of any counseling provided by her.* Since it was clear to me that counseling by Patricia Regucci had nothing to do with Judge Boyle's Orders I continued demanding that Defendant Zofia Babinski provide the Courts with proof of counseling through the Family and Children's Counseling and Testing Center.

On November 30, 1990 a motion hearing was held on this matter and on December 20, 1990 Hon. John J. Callahan signed an Order "to supply this court/Judge Callahan with a copy of the final diagnosis and proof of professional therapy pursuant to the Order of January 12, 1990". Plaintiff refused to comply. Hearings on matter of Defendant Zofia Babinski providing Court with required proof of her counseling continued through the Spring of 1991.

Because of the unusual efforts by Defendant Zofia Babinski to avoid providing any information about her counseling to the Courts, in December 1990 I contacted Defendant Patricia Regucci in writing and requested information on what kind of services she provided to my son Thomas.

*Appendix A*

Defendant Patricia Regucci first supplied me with a letter dated December 19, 1990 in which she falsely stated that my son was seen twice at her offices for counseling. Next, by letter dated December 26, 1990 she informed me that IBM paid for her services rendered to Thomas. Finally, by letter dated January 4, 1991 Defendant Patricia Regucci stated that during the counseling Thomas was "given reassurances the divorce wasn't his fault, support to stay out of the middle and helped to deal with his fears of talking to the judge.". Even then I was unable to connect the counseling provided to Thomas by Patricia Regucci with Judge Boyle's Orders but saw such counseling as additional, not Court ordered but merely voluntary, counseling.

On January 29, 1991 I filed a Complaint in the Union County Superior Court (Docket No. UNN-L-795-91) in which I named as Defendants Patricia Regucci, PPC and IBM. My lawsuit against those Defendants was a malpractice lawsuit and was not based on the same legal grounds as are raised here.

On March 12, 1991 IBM submitted to the N.J. Superior Court papers in which for the first time a claim was made that Thomas was seen by Defendant Patricia Regucci *because of* Judge Boyle's Orders. *This was the first time I became aware of that fact.* Same was repeated in IBM's papers for Dismissal and Summary Judgment dated May 30, 1991 and later. On July 8, 1991 Hon. Burton J. Ironson, J.S.C. denied IBM's request for Dismissal and Surmnary Judgment. On July 15, 1991 an Amended Complaint was filed by me. Again, the amended lawsuit was not based on the same legal grounds as here.

Throughout the State court proceedings IBM knowingly and intentionally, with full approval of IBM management, submitted false certifications of Zofia Babinski, in her capacity as an IBM

employee, regarding therapy and counseling provided to Thomas by Patricia Regucci. False statements were made regarding number of visits to PPC and that they were made pursuant to Judge Boyle's Orders.

In December 1991 Defendants PPC and Patricia Regucci moved in the malpractice suit for Dismissal and Summary Judgment. On January 24, 1992 Hon. Lawrence Weiss, J.S.C., dismissed my "professional malpractice" lawsuit against Defendants PPC and Patricia Regucci with prejudice. on January 24, 1992 Judge Weiss entered a "voluntary dismissal as to [Defendant] IBM without prejudice". In his written Opinion discussing the reasons for dismissal Judge Weiss made clear that his dismissal is of my "*professional negligence case* such as the case at bar which involves the alleged deviations of a certified social worker".

There are two reasons why information about the lawsuit in the State courts is *preemptively* provided here.

First — to show that this federal Civil Rights lawsuit is being filed timely. The New Jersey State Statute of limitations which applies to this federal lawsuit is 2 years. Under the New Jersey "discovery principle" statute of limitations does not begin to run until Plaintiff discovers, or in exercise of reasonable diligence, should discover, that he has an actionable claim. Since I reasonably found out about Defendants violating my Civil Rights on or about March 12, 1991 the time to file this Title 42 U.S.C. Section 1983 lawsuit would not run out until March 1993.

Second — to avoid Defendants from claiming that the matters at hand have been already resolved by the dismissal of my State lawsuit. In that case the legal grounds were different. Only in the

midst of the motion/discovery process in the State action did I find out that my civil rights were violated by Defendants and that violation of my rights was not the subject of that lawsuit.

When Defendant IBM moved, in May 1991, for Dismissal and Summary Judgment in the State lawsuit it provided parties with an Agreement between PPC and IBM, dated July 1, 1986. Patricia Regucci rendered services to my son Thomas under terms of that Agreement. Defendant Zofia Babinski is an IBM employee. The Agreement clearly shows that IBM management encouraged IBM employees to make use of the services of PPC by contractual agreement and that there was a tight coupling of the management of the two companies. The Agreement provides details of extensive "contract monitoring", "program evaluation", "management training", staff evaluation and ongoing training. The Agreement provides detailed and specific procedures for hiring and licensing of PPC employees.

Ultimately, the responsibility for the conduct of Patricia Regucci, an employee of PPC, lies with Rick Hellan, President of PPC, who established and implemented policies and procedures to be used by PPC employees when providing services to children of divorced parents. Ultimately, the responsibility for the conduct of Zofia Babinski, an employee of IBM, lies with John Akers, Chairman of IBM. John Akers has not only implemented policies and procedures which permitted and encouraged violation of my civil rights but also, in name of affirmative action, encourage female IBM employees to support alternative lifestyles, destroy traditional family values and use various IBM company resources to interfere in private family matters.

That is why Rick Hellan, in his capacity as President of PPC, and John Akers, in his capacity as Chairman of IBM, are named here as Defendants.

*Appendix A*

Defendant Zofia Babinski is being sued here for damages in both her individual capacity and her capacity as an IBM employee. Defendant Patricia Regucci is being sued here for damages in both her individual capacity and her capacity as a PPC employee.

DEMAND

For reasons described in this Complaint:

(1) Significant monetary Compensatory and Punitive damages are demanded, pursuant to 42 U.S.C. 1983, from all four Defendants,

(2) Significant Examplary damages are demanded from Defendants John Akers and Rick Hellan, pursuant to 42 U.S.C. 1983,

(3) Attorney fees and costs, from all Defendants, are demanded, pursuant to 42 U.S.C. 1988,

and the following injunctive relief from John Akers and Rick Hellan is demanded in their official capacities as Chairman of IBM and President of PPC:

(4) written plan, from both IBM and PPC, submitted for Plaintiff's and/or Court's approval, for training all counselors at PPC and all management employees involved in administering/managing Employee Assistance Programs at IBM Corporation; the objective of such training to be the establishment and implementation of correct procedures and policies on handling counseling and therapy services provided to divorced parents and their children so that the fundamental liberty rights of parents and children in general, and my and Thomas' specifically, are not violated in the future by employees of IBM and PPC.

*Appendix A*

Trial by Jury is demanded on all Counts.

DATED: December 31, 1992

s/ Babinski, Mark
Mark Babinski Plaintiff

85 5th Ave, Garwood, N.J. 07027
tel.: (908) 654-0596

## APPENDIX B — JUDGE SAROKIN OPINION FILED AUGUST 11, 1993

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civ. No. 92-5510 (HLS)

MARK BABINSKI,

Plaintiff,

v.

PATRICIA REGUCCI, ZOFIA BABINSKI, JOHN AKERS and RICK HELLAN,

Defendants.

OPINION

*Sarokin, District Judge*

Before the court are motions by defendants John Akers and Patricia Regucci to dismiss plaintiff's complaint against them.[1]

*Background*

This lawsuit arises out of plaintiff Mark Babinski's acrimonious divorce from his former wife, defendant Zofia Babinski, and their subsequent disputes over the custody of their now 13 year-old son Thomas. Plaintiff makes the following allegations in his complaint.[2]

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1. Also before the court is plaintiff's motion for summary judgment against defendant Zofia Babinski. However, because Ms. Babinski has not yet answered plaintiff's complaint, summary judgment is not available. Accordingly, the court has not considered the papers filed by plaintiff in support of this motion.

2. The court notes that plaintiff's allegations tell a confusing and often inconsistent story.

*Appendix B*

Within one month after the judgment of divorce between plaintiff and his former wife was entered by the Superior Court of New Jersey, Union County on May 2, 1988, plaintiff sought increased visitation rights with Thomas. In considering plaintiff's application, the Honorable John M. Boyle entered a series of orders, requiring plaintiff, his former wife and Thomas to submit to psychiatric evaluations and counseling through the Family and Children's Counseling and Testing Center of Elizabeth, New Jersey (the "Center" or the "Elizabeth Counseling Center"). Although Zofia Babinski and Thomas were evaluated by the Center in August and September, they did not receive any follow-up counseling from the Center as ordered by Judge Boyle in October. As a result, Judge Boyle issued another order, directing Zofia Babinski and Thomas to undergo further evaluation and counseling at the Center. According to plaintiff's complaint, while Zofia and Thomas were evaluated in February of 1989, they never received any counseling at the Center. Cmplt. at 4.

Instead, plaintiff alleges that Zofia Babinski took Thomas to Personal Performance Consultants ("PPC"), a counseling service provided to her free of charge as an employee of the International Business Machines Corporation ("IBM"). At PPC, Thomas was seen by defendant Patricia Regucci, a therapist licensed by the State of New Jersey. Plaintiff alleges that defendant Regucci "provided counseling to Thomas fully aware that it was in preparation for his court ordered evaluation . . ." Cmplt. at 4. Plaintiff further alleges that the counseling provided by defendant Regucci was in "violations [sic] of the standards of her profession and that she knew "she was not to provide counseling, did so, brainwashing . . . Thomas to instill in him good feelings toward his mother and bad feelings towards [plaintiff]." *Id.* at 5.

On April 19, 1989, Judge Boyle held a hearing regarding

plaintiff's application for increased visitation. Plaintiff maintains that "[a]s a result of the illegal counseling provided by Patricia Regucci to my son Thomas, Judge John M. Boyle denied me the requested expansion of visitation with Thomas." Cmplt. at 5-6. Specifically, plaintiff asserts in his complaint that:

> Therefore, on April 19, 1989 Hon. John M. Boyle, J.S.C., under the color of state law, custom and policy denied me the liberty of visitation with my son – without due process.
>
> . . .
>
> I was denied my 14th Amendment protected rights by Judge Boyle because of the activities of Defendants Zofia Babinski, Patricia Regucci, John Akers and Rick Hellan.[3]

*Id.* at 6.

Seemingly contradicting his characterizations of defendant Regucci's counseling of Thomas as "illegal" and as in violation of Judge Boyle's orders that counseling be obtained at the Elizabeth Counseling Center, plaintiff alleges that although he initially viewed the counseling provided to Thomas by Patricia Regucci as unconnected to Judge Boyle's orders as "additional, not Court ordered but merely voluntary, counseling," Cmplt. at 8, he changed his view of the counseling in the course of his professional

3. Perhaps contradicting himself, plaintiff alleges that he never heard of Patricia Regucci until, in response to a suit he filed in state court toward the end of 1989 in order to determine whether his former wife had undergone counseling as ordered by Judge Boyle, defendant Regucci submitted a letter stating that she had counselling sessions with Zofia and Thomas.

negligence lawsuit against defendant Regucci filed in New Jersey state court in 1990.[4] *Id.* At that time, plaintiff "became aware of [the] fact [that] Thomas was seen by defendant Patricia Regucci *because* of Judge Boyle's Orders." *Id.*

Lastly, plaintiff alleges that defendant Regucci rendered services to Thomas pursuant to an agreement between IBM and PCP. According to plaintiff, "[t]he Agreement clearly shows that IBM management encouraged IBM employees to make use of the services of PPC by contractual agreement and that there was a tight coupling of the management of the two companies." Cmplt. at 10. Plaintiff further alleges that:

> Ultimately, the responsibility for the conduct of Patricia Regucci, an employee of PPC, lies with Rick Hellan, President of PPC, who established and implemented policies and procedures to be used by PPC employees when providing services to children of divorced parents. Ultimately, the responsibility for the conduct of Zofia Babinski, an employee of IBM, lies with John Akers, Chairman of IBM. John Akers has not only implemented policies and procedures which permitted and encouraged violation of my civil rights but also, in name of affirmative action, encourage [sic] female IBM employees to support alternative lifestyles, destroy traditional family values and use various IBM company resources to interfere in private family matters.

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4. This suit was dismissed as to IBM and summary judgment granted in favor of Ms. Regucci.

> That is why Rick Hellan, in his capacity as President of PPC, and John Akers, in his capacity as Chairman of IBM, are named here as Defendants.

*Id.* at 11.

On December 31, 1992, plaintiff filed suit against defendants, asserting that their alleged actions violated his civil rights enforceable pursuant to 42 U.S.C. §§ 1983. Plaintiff seeks compensatory and punitive damages, especially from defendants Akers and Hellan, attorneys' fees and injunctive relief.[5]

*Discussion*

Defendants Akers and Regucci move to dismiss plaintiff's complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) primarily on grounds that they are private actors not subject to suit under § 1983, which imposes liability for violations of federal law only upon persons acting under color of state law.[6]

This court can only grant a motion to dismiss if, reading all inferences of the Complaint in plaintiff's favor, there is no set of

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5. The court notes that as of the date of this opinion, service has not been executed as to defendant Hellan. Service has been executed as to the remaining three defendants, of whom only defendant Zofia Babinski has failed to answer plaintiff's complaint.

6. Defendant Akers further argues that plaintiff has failed to allege the deprivation of any federal right. Defendant Regucci also asserts that this action is barred under the doctrine of res judicata. However, the court cannot reach the merits of defendant's res judicata argument on a motion to dismiss as this would require examination of documents extraneous to the pleadings. *See* Fed. R. Civ. P. 12.

facts on which plaintiff can prevail. *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957); *Scheuer v. Rhodes,* 416 U.S 232, 236 (1974). As defendant Akers correctly notes in his brief to the court, the court need only accept as true plaintiff's factual allegations. The court will not accept as true allegations regarding the legal effect of events set forth in plaintiff's complaint. *See* C. Wright & A. Miller, *Federal Practice and Procedure,* Civil 2d § 1357 at 319-20 (2d ed. 1990).

I. The Elements of a § 1983 Claim

It is well-settled that in order to state a claim upon which relief can be granted under § 1983, a plaintiff must allege both that the conduct complained of deprived him of rights, privileges, or immunities secured by the Constitution or federal law and was committed by a person acting under color of state law. *Parratt v. Taylor,* 451 U.S. 527, 535 (1981), *overruled on other grounds by Daniels v. Williams,* 474 U.S. 327 (1986); *see also Edwards v. City of Philadelphia,* 860 F.2d 568, 573 (3d Cir. 1988) (holding that in order to make a *prima facie* case under § 1983, the plaintiff must demonstrate that an individual acting under color of state law deprived him of a federal right).

In an opinion that has been characterized as "opaque" by the Third Circuit, *see Robb v. City of Philadelphia,* 733 F.2d 286, 288 (3d Cir. 1984), in *Lugar v. Edmonson Oil Co.,* the United States Supreme Court undertook a complex analysis of the elements of a § 1983 claim, considering at great length the relationship between the state action requirement of the Fourteenth Amendment, which makes federal constitutional rights available against the states, and the "under color of state law" component of § 1983, which provides a remedy for constitutional violations. 457 U.S. 922 (1982). The *Lugar* Court stated:

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> Our cases have . . . insisted that the conduct allegedly causing the deprivation of a federal right be fairly attributable to the State. These cases reflect a two-part approach to this question of 'fair attribution.' First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the state.

*Id.* at 937. "Without a limit such as this," the Court added, "private parties could face constitutional litigation whenever they seek to rely on some state rule governing their interactions with the community surrounding them." *Id.*

The *Lugar* Court pointed out that the requirements that the deprivation be caused by the state and that it actually occur at the hands of a state actor "collapse when the claim of constitutional deprivation is directed against a party whose official character is such as to lend the weight of the State to his decisions." *Lugar,* 457 U.S. at 937. Indeed, when "a § 1983 action is brought against a state official, the statutory requirement of action "under color of state law" and the state action requirement of the Fourteenth Amendment are identical." *Id.* at 929. However, [t]he two principles diverge when the constitutional claim is directed against a party without such apparent authority, *i.e.,* against a private party." *Id.* at 937. In such a case, to survive a motion to dismiss, the

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§ 1983 plaintiff must allege that: 1) "the claimed deprivation has resulted from the exercise of a right or privilege having its source in state authority," i.e., a state deprivation; and, 2) that the ostensibly private party defendants "may be appropriately characterized as 'state actors.' " *Id.* at 939. Considering plaintiff's complaint in light of this analysis, it is clear that plaintiff's complaint fails on both counts.

*A. State Deprivation*

The gravamen of plaintiff's complaint is that he was deprived of his Fourteenth Amendment liberty interest in his son Thomas' care, custody and management when Judge Boyle denied plaintiff increased visitation rights, allegedly as a result of the "illegal" counseling provided to Thomas by defendant Regucci at the instigation of Thomas' mother, defendant Zofia Babinski, under the direction of defendant Hellan and paid for by IBM. Put another way, although the actual deprivation was Judge Boyle's decision to deny plaintiff increased visitation with Thomas, according to plaintiff, it was the conduct of the private party defendants in relation to the counseling activities that led to the deprivation.

With regard to this conduct, plaintiff repeatedly alleges in his complaint that defendant Zofia Babinski failed to comply with Judge Boyle's orders that she and Thomas obtain counseling at the Elizabeth Counseling Center. Plaintiff also alleges that defendant Regucci knew "she was not to provide counseling" to Thomas and that her counseling of Thomas was "illegal." Thus, plaintiff alleges that these defendants *failed to heed* Judge Boyle's orders, not they acted in compliance with orders. Accepting these allegations as true, as the court must in considering a motion dismiss, the court concludes that plaintiff has failed to allege that his deprivation was "caused by the exercise of some right or privilege created *by the*

*State* or by a rule of conduct imposed *by the State* or by a person *for whom the State is responsible.*" *Lugar,* 457 U.S. at 937 (emphasis added). A discussion of the facts and holding of *Lugar* makes this clear.

At issue in *Lugar* was a Virginia statute permitting private parties to obtain a pre-judgment attachment of property under certain circumstances. In his complaint against the private parties that made use of this statute against him, the plaintiff alleged "that the deprivation of property resulted from [defendants'] 'malicious, wanton, willful, oppressive [sic], [and] unlawful acts.' " *Lugar,* 457 U.S. at 940. "By 'unlawful,' " the Court concluded, "[plaintiff] apparently meant 'unlawful under state law.' " *Id.* In determining that plaintiff had thus failed to allege that defendants' alleged deprivation could be fairly attributed to the State of Virginia, the Court stated:

> To say [that the conduct was 'unlawful under state law'] is to say the conduct of which [plaintiff] complained *could not be ascribed to any governmental decision;* rather [defendants] were acting contrary to the relevant policies articulated by the State.

457 U.S. at 940. Accordingly, plaintiff's complaint alleged no state involvement in the alleged deprivation and therefore did "not state a cause of action under § 1983 but challenge[d] only private action." *Id.*

Similarly, the plaintiff in this case has alleged that Thomas' counseling sessions with defendant Regucci were "illegal" and in violation of Judge Boyle's orders that the counseling take place at the Elizabeth Counseling Center. As such, defendants' alleged activities with regard to Thomas' counseling are wholly unrelated

to any law, action or procedure implemented by the State of New Jersey. Because plaintiff has failed to allege that defendants' activities are related to any activity by the State, and indeed has alleged that defendants' activities were contrary to orders issued by a New Jersey judge, plaintiff cannot have been deprived of any Fourteenth Amendment liberty interest by defendants' activities. Accordingly, it would seem clear that the court must dismiss plaintiff's complaint as to all defendants.[7]

Before reaching this conclusion, however, the court deems it necessary to discuss plaintiff's allegation, which contradicts all of his other allegations, that in the course of his state court professional negligence lawsuit against defendant Regucci he "became aware of [the] fact [that] Thomas was seen by Defendant Patricia Regucci *because* of Judge Boyle's Orders." Cmplt. at 8. By this allegation, plaintiff seems to suggest, albeit contrary to all of his other allegations, that defendant Regucci's counseling of Thomas resulted from Judge Boyle's orders, rather than being in violation of those orders. However, even taking this allegation in the light most favorable to plaintiff, this allegation does not save plaintiff's complaint.

It is well-settled in this Circuit that a private decision can only be attributed to a state when the state " 'has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the [state].' " *Robinson v. Canterbury Village, Inc.*, 848 F.2d 424, 428 (3d Cir. 1988) (quoting *San Francisco Arts & Athletics, Inv. v. United States Olympic Comm.*, 483 U.S. 522, 546 (1987)). As

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7. Although only defendants Regucci and Akers have sought dismissal, it is clear upon review of the complaint that the allegations relevant to the court's consideration of the state action issues apply equally to all of the defendants to this lawsuit.

plaintiff alleges throughout his complaint without inconsistency, Judge Boyle's orders all directed that Thomas be evaluated and receive counseling at the Elizabeth Counseling Center. As such, Judge Boyle's orders simply cannot be characterized as having compelled the counseling Thomas received from defendant Regucci. Absent this compulsion, defendants' alleged activities cannot be fairly attributed to the State of New Jersey and thus plaintiff's § 1983 complaint must be dismissed for failing to state a claim upon which relief can be granted.

*B. Under Color of State Law*

Even assuming that plaintiff's allegations cleared the first hurdle and sufficiently alleged a deprivation related to state activity, plaintiff's complaint would still be subject to dismissal for failing to allege that defendants acted under color of state law, the second element of a § 1983 claim.

In *National Collegiate Athletic Ass'n v. Tarkanian,* 488 U.S. 179 (1988), the Supreme Court set forth the general parameters of action taken under color of state law. The Court stated:

> 'Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law.'

*Id.* at 191 (quoting *United States v. Classic,* 313 U.S. 299, 326 (1941). The Court added:

> In the typical case raising a state-action issue, a private party has taken the decisive step that caused the harm to the plaintiff, and the

> question is whether the state was sufficiently involved to treat that decisive conduct as state action. This may occur if the State creates the legal framework governing the conduct, if it delegates its authority to the private actor, or sometimes if it knowingly accepts benefits derived from unconstitutional behavior.

*Id.* at 192. However, in *Tarkanian,* the final act challenged was action taken by a state university, which is clearly a state actor. Thus, the Court found that the question before it was not whether the university "participated to a critical extent in the [defendant's] activities, but whether [the university's] actions in compliance with the [defendant's] rules and recommendations turned the [defendant's] conduct into state action." *Id.* at 193.

This case is like *Tarkanian* in that the final act challenged by plaintiff is the decision by Judge Boyle, clearly a state actor, not to increase plaintiff's visitation rights with Thomas. It is also like *Tarkanian* in that plaintiff seeks to hold defendants, who are private actors, liable for the alleged influence that defendant Regucci's alleged "brainwashing" of Thomas had on Judge Boyle's decision. Finally, this case is like *Tarkanian* in that this court concludes that the alleged connection between defendant Regucci's counseling of Thomas and Judge Boyle's decision to deny plaintiff increased visitation rights, as a matter of law, does not render the activities by the defendants to this action in connection with that counseling state action. If defendants' alleged actions were to be deemed state action in this context, the law would have to be that all persons who participate in proceedings before state officials or who contribute to the decisions made by state officials — lobbyists, witnesses, experts, etc. — are state actors. Because this is not the law, plaintiff's complaint has failed to allege that defendants acted under color of state law.

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II. Leave to Amend

Finally, the court must consider plaintiff's request that, in the event that the court finds his original complaint to be defective, which is the case for the reasons discussed *supra*, the court permit him to file an amended complaint "that would be sufficient to cure the deficiency as to the 'factual specificity' and the nature of the claim." Plt. Opposition to Akers at 13.

As a general matter, the United States Supreme Court has stated that courts should freely grant leave to amend a complaint when justice requires. *Foman v. Davis*, 371 U.S. 178, 182 (1962). A factor to be considered in determining whether justice so requires is the utility or futility of such amendment. *See id.* (stating that "[i]f the underlying facts or circumstances relied upon by plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits."). In the Third Circuit, a § 1983 plaintiff whose complaint is dismissed for lack of specificity must be given a reasonable opportunity to cure the defects in his complaint. *Darr v. Wolfe*, 767 F.2d 79, 81 (3d Cir. 1985).

In considering plaintiff's complaint in light of these principles, the court concludes that plaintiff should not be granted leave to amend his complaint. Plaintiff's complaint does not suffer from a lack of specificity. Rather, plaintiff's very detailed complaint alleges facts that, taken as true, provide no basis for any legal relief. As such, amendment would be clearly futile. Furthermore, permitting plaintiff to amend his complaint, which would ultimately require the court to expend scarce resources in reviewing plaintiff's pleadings again, encroaches on the rights of those litigants with claims that deserve the court's attention. For these reasons, the court denies plaintiff's request that he be granted leave to amend his complaint.

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*Conclusion*

For the foregoing reasons, the court hereby grants defendant Ayers' and Regucci's motions to dismiss plaintiff's complaint, denies plaintiff's motion for summary judgment against defendant Zofia Babinski and, upon its own motion, dismisses plaintiff's complaint as to defendants Zofia Babinski and Rick Hellan. Plaintiff's complaint is dismissed in its entirety with prejudice.

s/ H. Lee Sarokin
H. LEE SAROKIN
U.S. District Judge

Date: August 11, 1993

## APPENDIX C — CERTIFICATION OF ROGER ELLIS

BUMGARDNER, HARDIN & ELLIS
COUNSELLORS AT LAW
A Professional Corporation
673 Morris Avenue
Springfield, New Jersey 07081
(201) 564-6500
Attorneys for Defendant
Patricia Regucci

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 92-5510 HLS

Civil Action

MARK BABINSKI,

Plaintiff,

vs.

PATRICIA REGUCCI, ZOFIA BABINSKI, JOHN AKERS Chairman, IBM Corp., RICK HELLAN, President, PPC, Inc.,

Defendants.

AFFIDAVIT

STATE OF NEW JERSEY )
SS:
COUNTY OF UNION )

ROGER G. ELLIS, ESQ., of full age being duly sworn, according to law, upon my oath deposes and says:

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1. I am an attorney at law of the State of New Jersey and member of the law firm of Bumgardner, Hardin & Ellis, P.A. and have been entrusted with the handling of the defense of the within matter on behalf of Defendant, Patricia Regucci. In that capacity, I am fully familiar with the facts herein.

2. Plaintiff's Complaint in this matter was filed on December 31, 1992.

3. On March 9, 1993 service was effected on defendant, Patricia Regucci. I was retained to represent Ms. Regucci on March 11, 1993.

4. Shortly thereafter, I was made aware of plaintiff's instant motion to compel a non-party to this action, Paul Tisone, to provide plaintiff with the address of a party defendant, Rick Hellan.

5. Paul Tisone is the acting President of a company known as Personal Performance Consultants (hereinafter PPC). Rick Hellan, a named defendant in this action is a past President of PPC .

6. My firm previously represented the interests of PPC and Patricia Regucci in a matter filed by the plaintiff in the Superior Court of New Jersey, Law Division, Union County.

7. Plaintiff's instant Complaint derives from the same set of allegations that were the subject of the suit filed by the plaintiff, *Babinski v. Regucci et al*, Superior Court, Law Division, Union County, Docket No: UNN-L-795-91. (Exhibit A - copy of Complaint)

8. That Complaint was disposed of by Order of summary judgment on January 22, 1992 by the Honorable Lawrence Weiss, J.S.C. Judge Weiss ordered specifically that Personal Performance

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Consultants and Patricia Regucci were entitled to summary judgment with prejudice. (Exhibit B - Order)

9. Judge Weiss, at oral argument on the motion, made specific findings that plaintiff's Complaint was without merit, frivolous and that the defendants were entitled to pursue an action against the plaintiff for instituting a frivolous claim. (Exhibit C - Transcript of motion, P. 16-17)

10. Plaintiff appealed Judge Weiss' ruling and the appeal was dismissed by the Appellate Division. (Exhibit D - Order dismissing Appeal)

11. The plaintiff has filed two additional actions arising out of the same allegations in addition to the instant action and the action referred to in Paragraph 8 of this Affidavit. *Babinski v. Babinski, et al*, Superior Court of New Jersey, Law Division, *Union* County, Docket No: UNN-L-5526-91 and *Babinski v. The Supreme Court of New Jersey, et al,* United States District Court, District of New Jersey, Civil Action No: 91-5287 (DRD).

12. All of these suits stem from plaintiff's divorce from his wife Zofia Babinski and the custody order that was entered by virtue of that divorce action.

13. Since that proceeding, plaintiff has continually harassed Personal Performance Consultants, its employees such as Patricia Regucci and others by instituting frivolous lawsuits, making frivolous motions and discovery demands.

14. By virtue of the instant Complaint and the pending motion, plaintiff seeks to continue this relentless harassment of PPC and its employees.

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15. Plaintiff seeks the extraordinary relief of asking this Court to *compel discovery from a non-party to this action.*

16. Our interests, as counsel retained by PPC on behalf of Patricia Regucci in the instant matter and as counsel for PPC and Ms. Regucci in the past, is to see to it that this burdensome, frivolous and unduly harassing conduct on the part of plaintiff against PPC and its employees ceases.

17. The plaintiff's allegations against Ms. Regucci and PPC have already been found to be without merit in the New Jersey Superior Court, Law Division.

18. Plaintiff is embarking on a new journey designed to circumvent the findings at the state level. The mechanism he has chosen is the United States District Court for the District of New Jersey.

19. By substituting new defendants in the instant action, plaintiff is attempting to make it appear as though this action is somehow different from all of the prior actions he has filed.

20. It is respectfully requested that the plaintiff's instant discovery request, to compel a non-party employee of PPC to provide him with an address of a past President of PPC be denied.

22. To grant such a request would be tantamount to sanctioning plaintiff's harassing and frivolous conduct that has persisted for the past five years.

_____

ROGER G. ELLIS

Sworn and Subscribed to before me this day , 1992.

NOTARY PUBLIC OF THE STATE
NEW JERSEY

## APPENDIX D — TRANSCRIPT OF JUDGE WEISS, SUPERIOR COURT OF NEW JERSEY DATED JANUARY 22, 1992

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION — UNION COUNTY
DOCKET NO. UNN-L-795-91
APPELLATE DOCKET NO. A-

MARK BABINSKI and Mark Babinski as Custodian for THOMAS BABINSKI,

Plaintiffs,

-vs-

PATRICIA REGUCCI and PERSONAL PERFORMANCE CONSULTANTS, INC. and INTERNATIONAL BUSINESS MACHINES CORP.,

Defendants.

TRANSCRIPT OF:
MOTION

Place: Union County Courthouse
Elizabeth, New Jersey
Date: January 22, 1992

BEFORE:

THE HONORABLE LAWRENCE WEISS, J.S.C.

APPEARANCES

MARK BABINSKI, Plaintiff Pro Se

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BUMGARDNER, HARDIN & ELLIS, ESQS.,
BY: ROGER G. ELLIS, ESQ.,
Attorneys for Defendants Regucci and PPC

RIKER, DANZIG, SCHERER, HYLAND & PERRETTI, ESQS.
BY: ROBERTA SAMUELS, ESQ.,
Attorneys for Defendant IBM

MICHAEL J. DAUGENTI, C.S.R.
OFFICIAL COURT REPORTER

* * *

[2] JANUARY 24, 1992

THE CLERK: 34, 35, 36, 37 and 38.

MR. BABINSKI: Mark Babinski, plaintiff and custodian for Thomas Babinski.

MR. ELLIS: Roger G. Ellis for the defendants PPC and Regucci.

MS. SAMUELS: Roberta Samuels of Riker Danzig for the defendant IBM.

THE COURT: Let's do motion number 34. Defendant Regucci and Personal Performance move for summary judgment dismissing complaint with prejudice.

Does the moving party want to say anything?

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MR. ELLIS: Yes, just briefly. I'll obviously rely on my papers. I would just like to perhaps call the Court's attention to a case that I cited in the brief and really didn't cite it as strongly as I think I should have and that's the case of *Schwartz versus the Regency of the University of California,* a case which is cited near the end of my brief. It's a case which is quite similar, I think, to the alleged facts or at least the facts as I understand them to be at the time I wrote the brief, wherein the case was dismissed by the Court. And I just call the Court's attention to that particular case.

Actually, I think that the difficulty with my motion for summary judgment is that it appears in the [3] opposition papers that the facts keep changing and I'm only addressing in my motion for summary judgment those allegations in the complaint which I can deal with. And I think my brief sets forth there's no proofs in this case that Mr. Babinski or his son have any damages as a result of anything that my client did and I think I'm entitled to summary judgment.

THE COURT: You want to say anything?

MR. BABINSKI: Yes. I believe that Mr. Ellis is correct in saying that the facts keep changing. That was the whole intent of the discovery that was permitted by Judge Ironson. We're finding out that the initial letter of Mrs. Regucci about my son being provided counseling twice turned out to be false. She provided only once. I'm finding out that — that was actually put forth around the summer, that Mrs. Regucci rendered services to my son under court orders.

When I was filing the original complaint I hadn't the slightest idea that there was any relation between whatever Regucci was doing and with court orders by Judge Boyle. This was presented

very strongly by both IBM and PPC/Regucci. I addressed that not really quite completely in the second and amended complaint. And at this stage of discovery it's coming out that this was in complete violation of Judge Boyle's four orders from July '88, from [4] August '88, from November '88, and January 26th, '89. All these orders specifically said that counseling had to be done by The Family Children's Counseling Center.

Various false, perjurious certifications have been submitted claiming that my son, Tom, was seen by Regucci twice. And at this stage, quite frankly, I'm convinced that Regucci intentionally tried to tell me he was seen twice by her to claim that the service that was ordered by Judge Boyle was rendered to him, which is not the case at all.

True, the whole thing is becoming a moving target. The information I'm getting from the incomplete interrogatories from both IBM — answers from both IBM and PPC/Regucci come up with brand new facts which I was not aware of. At this stage I'm convinced that another amended complaint will have to be filed. There are issues, for example, of PPC was employer of Regucci blatantly discriminated based on marital and sex status and that was evidence actually not even in '89 but 1990 for the submission of these papers.

I have seen two experts — well, I'll want to introduce them as experts here, who told me that it's the standard of the profession that any family counseling would have to get me involved; I would have to be informed. It was not even an issue of getting me [5] involved. I was not even informed. When I tried to get information about it, we're finding out that she refused to provide it.

At this stage I would ask the Court to deny Mr. Ellis' motion

for summary judgment and not really grant because I'm not moving for that yet, but note that I will be asking for filing another amended complaint which I will be bringing the following issues and claims against Regucci, and the rest from discovery, where they can relate back, according to the court rules, to my original filing.

These new issues will be that she intentionally violated Judge Boyle's orders and denied my son psychological counseling that was ordered by Judge Boyle and that's in violation of New Jersey statutes which deal with child cruelty and neglect. And these statutes are very specific because they say if any person gets involved in denying something to a child that the child is supposed to get in terms of health or mental health, it's a criminal violation. That's one new issue that will be added.

Another new issue is that I will be claiming under the civil rights laws of New Jersey that PPC and IBM Corporation through their definition of provision are maintaining a public place of accommodation as defined by [6] the statutes which discriminates based on marital status and sex. There is the issue that such claims are supposed to be brought within 180 days of occurrence and I thought I addressed it very meticulously. It's the case of *Lloyd versus Stone Harbor* and it was mentioned in one of my letter memorandum which states clearly that even if you don't go by the 180-day statute of limitations for violations by places of public accommodation, you have a right to sue on constitutional rights. It was the *Lopez* case that says the rule of discovery, if you discover it later than 180 days you have the right to pursue it.

This is what I just wanted to add — not really add but reinforce from my letter memorandum and various briefs that I submitted. I don't really have much more to add than what was provided in

these pleadings that I submitted, except to say that true, it took me a year to get to this stage where I'm suddenly finding out that — I don't want to go far and say there's a plot to deceive the Court, there were various submissions to the court, intentional submissions to make the Court, Judge Boyle and Judge Callahan, convince them that the psychology that Judge Boyle — the psychiatric treatment that Judge Boyle ordered for my son was rendered and it was not. So some of these new facts that developed are coming out not only from the 1989 services that Regucci rendered my son but [7] from her 1990 letters to me. The intent was very clear.

One thing that I might not have added in my papers was that in January of 1991 — in December of 1990 and January of 1991, I was trying to contact Regucci. And Mr. Ellis is aware of that. My complaint has been filed January 29th to my ex-wife in the Babinski versus Babinski matter, family matter, docketed under FM-10482-88. I remember that since I'm here all the time. She moved twice to prohibit my contacts with Regucci. Judge Callahan denied that. He said that I have the right to try to contact her. But it was clear evidence, because that was the time when I was trying to get information from Regucci, that something was wrong and that something is not really right if she's trying to prohibit my contact with Regucci who rendered services to my son and my ex-wife filed for that on advice of Regucci or request of Regucci.

There has been a long history for two years. This goes back two years of me trying to get my ex-wife to submit her psychiatric evaluations under Judge Boyle's 1988 and 1989 — January '89 orders to the Court. The Court was supposed to have received these within a month or two of January 1989. I have applied to Judge Weeks in a series of motions. Judge Weeks issued a series of orders compelling my ex-wife to submit these psychiatric [8] evaluations

of her own, not my son, but of her own to the Court. She refused to do that.

Judge Callahan issued three orders to that effect in which they finally submitted them on February 14, 1991. And here's a new item that I'll be asking today, if possible, not through a formal motion. There has been communication by Regucci submitted to Judge Callahan relating to services rendered to both my son and Zofia Babinski. This is apparently dated February 14th.

THE COURT: It's not before me, sir. You can't do that. You can't request these things. They have to be filed. We're just dealing with this motion.

MR. BABINSKI: I can't request them at this stage? You're saying they cannot be requested at all?

THE COURT: Just deal with what's before me.

MR. BABINSKI: Well, that would be the new item, otherwise everything else is in the paper.

THE COURT: Motion by defendant Regucci and Personal Performance consultants, summary judgment is hereby granted. I'll put my opinion on the record.

The plaintiff's motion for cross motion for summary judgment obviously is denied. He moves for initial — he wants the Court to initiate disciplinary proceedings. The Court understands its responsibility. This Court is not initiating any proceedings. It's not [9] the function of the Court to do that under these facts.

So that takes care of 34, granted. 39, 38 is denied.

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The next motions are 35, 36 and 37. 35 is to move to compel defendant Regucci and defendant Personal — they're out of the case, 35 becomes moot. 35 is moot since they're no longer in the case.

Let's go to 36. That's moot because that's your motion for — we just have IBM moves to strike— 36, I'll hear you on that one.

MS. SAMUELS: This is a motion to strike, your Honor, interrogatories.

THE CLERK: 36 is more specific interrogatories. 37 is to strike.

THE COURT: 37 to strike.

MS. SAMUELS: Your Honor, I'd just like to reiterate briefly what we stated in our papers. The reason that IBM has moved to strike certain of the plaintiff's interrogatories is that they request information that is confidential, prejudiced and irrelevant to the issues in this case. It's IBM's position that plaintiff's discovery requests are merely meant to harass, embarrass and annoy this defendant. And for those reasons and the reasons set forth in our papers, we would request that the specific interrogatories we [10] indicated be stricken.

MR. ELLIS: I just want to point out the only liability for IBM would be vicarious liability for the actions of Patricia Regucci and I think, therefore, the motion to strike is also moot.

MR. BABINSKI: Frankly, if you dismiss, in effect in granting summary judgment to Regucci and PPC, you're dismissing the case against Regucci and PPC

THE COURT: That's right.

MR. BABINSKI: In that context, frankly, the case against IBM should also be dismissed if Regucci and PPC cannot be liable, how can they be liable? I'm making a claim against IBM.

THE COURT: Sure.

MR. BABINSKI: I will be appealing your decision for dismissing Regucci and PPC. At this stage the issue of whether they should answer interrogatories or not should be moot. We should just wait until the Appellate Division makes a decision.

THE COURT: I agree with you, sir. Granted, it's moot.

MR. BABINSKI: However, there are some other issues that were raised by me in my motions or cross motions and that was for this court under the court rules to forward to the Office of Attorney Ethics a charge that [11] Mr. Ellis has conducted—

THE COURT: I've already ruled on that. I said I'm not going to do that. If you want to do it, you have the right. This Court is not going to do it.

MR. BABINSKI: What about the charge against Roberta Samuels?

THE COURT: I'm not doing it as to either lawyer. You can do it if you want. I'm not going to submit any charges against them, okay?

MR. BABINSKI: Can I ask one other question? Obviously

IBM and Mr. Ellis and PPC/Regucci will be moving or might move to require that I pay the cost of this lawsuit.

THE COURT: That's when they move specifically. I'm going to — if they want to move, they have to file now a separate motion and then I'll rule on that.

MR. BABINSKI: Okay.

THE COURT: Okay, thank you.

MR. ELLIS: Thank you, your Honor.

MR. BABINSKI: Judge, could I also ask would it be possible for you to put on the record the reasons why —

THE COURT: Sure. Not now. I'm not going to do it now. I have my opinion. I'm going to put it on the record.

[12] MR. BABINSKI: It's going to be a written opinion?

THE COURT: I'm going to put it on the record, because I had 70 motions, sir. If I put every one on the record while everyone was here, we would be finished sometime tomorrow. I have it all written out. I'll put it on the record and then you can order a copy.

MR. BABINSKI: That will be part of the record for appeal?

THE COURT: Absolutely, that is part of the record. It's going to go stamped on this order for summary judgment for the reasons set forth on the record.

Riker Danzig's motion is now moot for the reasons set forth on the record.

*Appendix D*

The Court also is signing an order submitted by the State department, the attorney general, in regard to the deputy attorney general that the records of access to the records of a license filed by Patricia Regucci is hereby denied.

(The following is without the presence of the attorneys.)

THE COURT: Defendants Regucci and Personal Performance Consultants move for summary judgment dismissing plaintiff's complaint with prejudice. Defendant cross moves for summary judgment.

[13] Plaintiff, pro se, has filed suit for himself and his son against several defendants. Regarding defendants Regucci and PPC, plaintiff alleges that Regucci, an employee of PPC, deviated from accepted standards of care by allegedly mistreating and "brainwashing" plaintiff's son during counseling. Defendants move for summary judgment dismissing plaintiff's complaint and for attorney fees and costs for the filing of a frivolous lawsuit.

The circumstances surrounding this dispute arise out of a divorce proceeding between plaintiff and his former wife. That proceeding is active and still pending in the Family Part of this county.

Apparently, plaintiff and his wife were divorced in June 1988 and both were granted joint custody of their son. Plaintiff's ex-wife was given physical custody and plaintiff visitation rights. To say the very least, the divorce has not been a civil experience. Several restraining orders have been entered against plaintiff to keep him away from his former wife.

*Appendix D*

By court order of November 18, 1998, July 22, 1988 and August 18, 1988, Plaintiff's son was to be provided with some short-term psychotherapy.

Defendants assume, sensibly, that plaintiff's ex-wife, an employee of IBM, decided to take advantage of IBM's free counselling services offered through defendant [14] PPC.

According to plaintiff's complaint, sometime in early 1990, plaintiff learned from his ex-wife's attorney that his son had gone to counselling. Ever since then, in an almost frenzied state, plaintiff has tried to find out any and all information he could about his son and his counselling at defendant PPC, and specifically the counselling strategies and results regarding defendant Regucci's meetings with his son.

The standard of care exhibited by a health care professional and whether that standard was deviated from requires expert testimony and is not usually left to the province of a jury. *Walck v. Johns-Manville Products Corp.*, 56 N.J. 533, 562 (1970). *See Santari v. Rosenfeld*, 34 N.J. 128, 135 (1961); *Schueler v. Strelinger*, 43 N.J. 330, 344-45 (1964).

A professional negligence case such as the case at bar which involves the alleged deviation of a certified social worker clearly falls within the line of cases calling for expert opinion. *See Matter of Reach, McClinton & Co., Inc.*, 102 B.R. 381 (D.N.S. 1989). (Expert testimony is necessary to establish professional malpractice under N.J. law when the matter is so esoteric that a jury of common experience could not form valid judgment as to whether conduct of defendant was [15] reasonable).

In the instant matter, plaintiff has never supplied defendants

with any expert reports or even identified experts that would appear at trial. According to a letter from Judge Ironson to defendants dated July 8, 1991, all discovery was to have been completed by October 15, 1991. No extensions have been granted.

In addition, plaintiff's complaint fails to state any logical bases, as a matter of law, for a claim of intentional infliction of emotional distress. In *Buckley v. Trenton Savings Fund Society,* 111 N.J. 355 (1988), our Supreme Court, in relying upon the Restatement (Second) of Torts, held that "a claim for intentional infliction of emotional distress [requires] outrageous conduct by the defendant, proximate cause and distress that is severe." *Id.* at 366-67.

Plaintiff's claims are totally devoid of merit. Plaintiff's son has undergone some therapy in order that he may better cope with his parents' nasty divorce. Therapy was court ordered.

Furthermore, plaintiff contends that defendants are liable for negligent infliction of emotional distress. This argument too is illogical. To show negligent infliction, plaintiff must prove (1) death or serious physical injury of another caused by defendants' actions; [16] (2) a close family relationship between plaintiff and injured person; (3) that plaintiff observed the injury or death and (4) that severe emotional distress resulted. *Portee v. Jaffee*, 84 N.J. 88,101 (1980).

Plaintiff has not set forth any indication of serious injury or death involving his son. As a matter of law, defendants were not negligent.

Plaintiff "cross moves" for the initiation of disciplinary proceedings against attorney Roger Ellis, counsel for defendants

PPC and Regucci. The gist of plaintiff's argument is that Mr. Ellis has perjured himself through lying on affidavits. Plaintiff's cross-motion is denied. Not only is it meritless, but plaintiff may bring his own ethics complaint concerning Mr. Ellis to the Ethics Committee of this district.

It is very clear to this Court that it is the plaintiff who must review his own conduct before seeking admonishment of others. Plaintiff states on page four of his brief that he is not surprised that "dishonesty on part of attorneys is a fact of life and is accepted and condoned in the Union County Superior Court. . . " Further, on page 20 of same brief, plaintiff implies that the judge had better act in accordance with his judicial responsibilities.

The Court has carried out its responsibilities in [17] regard to this motion.

Accordingly, defendants' motion is granted. Plaintiff's complaint is dismissed. Further, defendants may file additional papers with this court so that attorneys' fees and costs may be awarded pursuant to N.J.S.A. 2A:15-59.1. Clearly, plaintiff's complaint was entirely frivolous. It is not necessary to address defendant's arguments concerning the applicability of the Marriage Counselling Act, N.J.S.A. 45:8(b)-1 *et seq.*, to the instant motion.

* * *

*Appendix D*

## CERTIFICATE

I, MICHAEL J. DAUGENTI, a Certified Shorthand Reporter of the State of New Jersey, do hereby certify that the foregoing is a true and accurate transcript of my stenographic notes.

s/ Michael J. Daugenti
MICHAEL J. DAUGENTI, C.S.R.

DATE: 3/16/92
LICENSE NO. XI00476

## APPENDIX E — LETTER TO MR. BABINSKI FROM MS. REGUCCI DATED DECEMBER 26, 1990

December 26, 1990

Mr. Mark Babinski
85-5th Avenue
Garwood, N.J. 07027

Dear Mr. Babinski:

Personal Performance Consultants, Inc., provided services to your son Thomas as part of its IBM Employee Assistance Program. IBM pays for all the costs of the program and informs its employees of the existence of the program.

There was no diagnosis given for Thomas.

Sincerely,

PERSONAL PERFORMANCE CONSULTANTS, INC.

s/ Pat Regucci
Patricia Regucci
Counselor/Consultant

PR/pd

PERSONAL
PERFORMANCE
CONSULTANTS, INC.
22 Madison Avenue
Paramus, NJ 07652
201-587-0020

## APPENDIX F — THIRD CIRCUIT JUDGMENT ORDER DATED MAY 5, 1994

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 93-5554

MARK BABINSKI,

Appellant

v.

PATRICIA REGUCCI; ZOFIA BABINSKI, JOHN AKERS, Chairman, IBM Corp; RICK HELLAN, President, PPC Inc.

On Appeal From the United States District Court
For the District of New Jersey
(D.C. Civil Action No. 92-cv-05510)
District Judge: Honorable H. Lee Sarokin

Submitted March 11, 1994

BEFORE: STAPLETON, HUTCHINSON and ROTH,
*Circuit Judges*

JUDGMENT ORDER

After consideration of the contentions raised by appellant, it is

ORDERED AND ADJUDGED that the judgment of the district court entered August 12, 1993,be and is hereby affirmed.

Costs taxed against appellant.

*Appendix F*

By the Court,

s/ Walter Stapleton
Circuit Judge

ATTEST:
s/ P. Douglas Sisk
Clerk

Dated: May 5 1994